

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3 UNITED STATES OF AMERICA,
4 Plaintiff,
5 VS. CR. NO. 15-4268 JB
6 ANGEL DELEON, et al.,
7 Defendants.

9 Transcript of Motion Proceedings before
10 The Honorable James O. Browning, United States
District Judge, Las Cruces, Dona County,
New Mexico, commencing on November 8, 2017.

12 For the Government: Ms. Maria Armijo; Mr. Randy
Castellano; Mr. Matthew Beck

15 For the Defendants: Mr. Brock Benjamin, Ms. Cori
16 Harbour-Valdez; Mr. Patrick Burke; Mr. Jim Castle;
17 Mr. Robert Cooper; Mr. James Lahann; Mr. Orlando
18 Mondragon; Mr. John Granberg; Mr. Billy Blackburn;
Ms. Amy Jacks; Mr. Richard Jewkes; Mr. Marc Lowry;
Ms. Amy Sirignano; Mr. Michael Davis; Ms. Carey
Bhalla; Mr. Ryan Villa; Mr. Donovan Roberts; Ms.
Angela Arellanes; Mr. Jerry Walz

For Defendant Martinez: Ms. Marcia Milner

21 For the Defendants (Via telephone): Ms. Justine
Fox-Young; Mr. Christopher Adams

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119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9499

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(505) 843-9494
FAX (505) 843-9492
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e-mail: info@litsupport.com

1 (The Court went on the record at 10:59 a.m.
2 Defendant Christopher Chavez was not present the
morning session.)

6 All right. The Court will call United
7 States of America versus Angel DeLeon, et al.,
8 Criminal Matter No. 15-4268.

9 If I could get entries of appearance for
10 the Government.

11 MS. ARMIJO: Good morning, Your Honor.
12 Maria Armijo, Randy Castellano, and Matthew Beck on
13 behalf of the Government.

14 THE COURT: All right. Ms. Armijo, Mr.
15 Castellano, Mr. Beck, good morning to you.

16 And let's go to Defendant Joe Lawrence
17 Gallegos.

18 MR. BENJAMIN: Good morning, Your Honor.
19 Brock Benjamin on behalf of Mr. Gallegos.

20 THE COURT: All right. Mr. Benjamin, Mr.
21 Galleqos, good morning to you.

22 | And for Defendant Edward Troup.

23 MS. HARBOUR-VALDEZ: Good morning, Your
24 Honor. Cori Harbour-Valdez and Pat Burke on behalf
25 of Edward Troup.

1 THE COURT: All right. Ms. Harbour-Valdez,
2 Mr. Burke, Mr. Troup, good morning to you.

3 THE DEFENDANT: Good morning.

4 THE COURT: And for Defendant Billy Garcia.

5 MR. COOPER: Good morning, Your Honor. Bob
6 Cooper and Jim Castle on behalf of Mr. Garcia, who is
7 present today.

8 THE COURT: All right. Mr. Cooper, Mr.
9 Castle, Mr. Garcia, good morning to you.

10 THE DEFENDANT: Good morning, Your Honor.

11 THE COURT: And for Defendant Allen
12 Patterson.

13 MR. LAHANN: Good morning, Your Honor.
14 Jeff Lahann on behalf of Mr. Patterson.

15 THE COURT: Mr. Lahann, good morning to
16 you. Mr. Patterson, morning to you.

17 THE DEFENDANT: Good morning, Your Honor.

18 THE COURT: All right. We don't have
19 Mr. Chavez yet, but he's en route. He's still a
20 couple of -- an hour and a half out. But I
21 understand that counsel are going to waive his
22 appearance, and we're going to try to dance around
23 and do motions that maybe don't require his
24 appearance.

25 MR. MONDRAGON: Good morning, Your Honor.

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1 Orlando Mondragon and John Granberg on behalf of Mr.
2 Chavez. We have no objection having the hearing
3 without his presence.

4 THE COURT: Okay. Well, the rules of
5 engagement are that if you get to a place where it's
6 getting to the heart of your case, and you'd like for
7 him to be here then tell me, and we'll stop and
8 reconfigure. We've got a lot of work here to do. So
9 I want you to feel comfortable, and want Mr. Chavez
10 to feel comfortable about what's going on here.
11 We'll try to make the most of this time.

12 All right. Mr. Mondragon, Mr. Granberg,
13 good morning to you.

14 All right. Let's go to Defendant Arturo
15 Arnulfo Garcia.

16 MR. BLACKBURN: Good morning, Your Honor.
17 Billy Blackburn on behalf of Mr. Arturo Garcia, who
18 is present.

19 THE COURT: Mr. Blackburn, good morning to
20 you. Mr. Garcia, good morning to you.

21 THE DEFENDANT: Good morning.

22 THE COURT: And for Defendant Daniel
23 Sanchez.

24 MR. JEWKES: Good morning, Your Honor. Amy
25 Jacks, Richard Jewkes representing Daniel Sanchez,

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1 who is present before the Court.

2 THE COURT: All right. Mr. Jewkes,

3 Ms. Jacks, and Mr. Sanchez, good morning to you.

4 THE DEFENDANT: Good morning.

5 THE COURT: And for Defendant Anthony Ray
6 Baca.

7 MR. LOWRY: Good morning, Your Honor. Marc
8 Lowry on behalf of Anthony Ray Baca, who is present
9 in the courtroom.

10 THE COURT: All right. Mr. Lowry, Mr.
11 Baca, good morning to you.

12 THE DEFENDANT: Good morning, Your Honor.

13 MR. LOWRY: Your Honor, I'd like to excuse
14 Ms. Duncan. She had an emergency court hearing in
15 Albuquerque, so she will not be here today or
16 tomorrow.

17 THE COURT: All right. I understood that
18 she wasn't going to be present.

19 All right. For Christopher Garcia?

20 MS. SIRIGNANO: Good morning, Your Honor.

21 Amy Sirignano, and Christopher Adams appearing by
22 telephone, and Cynthia Gilbert, and Michelle Gallegos
23 on behalf of Christopher Garcia.

24 THE COURT: All right. Ms. Sirignano,
25 Ms. Gilbert, Ms. Gallegos -- Mr. Adams, are you

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1 there, Mr. Adams?

2 MR. ADAMS: I am, Your Honor.

3 THE COURT: All right. Good morning to

4 y'all. Mr. Garcia, good morning to you.

5 And for Defendant Carlos Herrera?

6 MR. DAVIS: Michael Davis and Carey Bhalla
7 on behalf of Mr. Herrera. Also present is our
8 paralegal, Sonya Salazar.

9 THE COURT: All right. Mr. Davis, Ms.

10 Bhalla, Ms. Salazar, and Mr. Herrera, good morning.

11 And for Defendant Rudy Perez.

12 MR. VILLA: Your Honor, good morning. Ryan
13 Villa on behalf of Rudy Perez, who is present. My
14 co-counsel, Justine Fox-Young, is with us on the
15 phone.

16 THE COURT: All right. Are you there, Ms.
17 Fox-Young?

18 MS. FOX-YOUNG: Yes. Good morning, Your
19 Honor.

20 THE COURT: How is that new baby doing?

21 MS. FOX-YOUNG: He's doing great. Thank
22 you.

23 THE COURT: All right. Are you doing okay?

24 MS. FOX-YOUNG: Doing great.

25 THE COURT: All right. Mr. Villa, Ms.

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1 Fox-Young, good morning to you. Mr. Perez, good
2 morning to you.

3 THE DEFENDANT: Good morning.

4 THE COURT: And for Defendant Andrew
5 Gallegos.

6 MR. ROBERTS: Good morning, Judge. Donovan
7 Roberts on behalf of Andrew Gallegos.

8 THE COURT: All right. Mr. Roberts, good
9 morning to you. And Mr. Gallegos, good morning to
10 you.

11 THE DEFENDANT: Good morning.

12 THE COURT: And for Defendant Shauna
13 Gutierrez.

14 MS. ARELLANES: Angela Arellanes with Ms.
15 Gutierrez, who appears in person.

16 THE COURT: All right. Ms. Arellanes, good
17 morning to you. Ms. Gutierrez, good morning to you.

18 THE DEFENDANT: Good morning.

19 THE COURT: And for Defendant Brandy
20 Rodriguez.

21 MR. WALZ: Good morning, Your Honor. Jerry
22 Walz on behalf of Brandy Rodriguez, and she's
23 present, Your Honor.

24 THE COURT: All right. Mr. Walz, good
25 morning to you. Ms. Rodriguez, good morning for you.

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1 THE DEFENDANT: Good morning.

2 THE COURT: All right. Well, we've got a
3 number of motions -- I think I had 21 when I came
4 down here, and I've managed to get through most of
5 them except right at the tail end. It's a two-day
6 hearing. I didn't quite get done. I was in court
7 till about 4:00 or so yesterday afternoon, so I was
8 up there for a while. I certainly can take them
9 seriatim, and take them in the order that -- I think
10 there has been some discussions between y'all and
11 Ms. Wild about the order of them. I can take them in
12 that order. If, on the other hand, I think they're
13 mostly -- they're all defendants' motions, unless I'm
14 missing something. So I certainly am willing to be
15 educated in a different way than how they're sort of
16 teed up.

17 But without any objection it seemed to me
18 that maybe the thing we ought to do is -- and maybe I
19 ought to get your appearance at this time,
20 Ms. Milner. I think you're here for Mr. Martinez; is
21 that correct?

22 MS. MILNER: Marcia Milner for Mr. Roy Paul
23 Martinez.

24 THE COURT: All right. Ms. Milner, good
25 morning to you. And Mr. Martinez, good morning to

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1 you.

2 THE DEFENDANT: Good morning.

3 THE COURT: Do you want to take that motion
4 up first, so we can get you in and out of here?

5 MS. MILNER: Mr. Davis --

6 THE COURT: Unless anybody thinks
7 otherwise, why don't we skip to that one. I think
8 that's kind of number 2 on my docket. If you'll give
9 me a chance. And Mr. Davis -- I think it's -- no,
10 it's the Government's motion. This is the
11 Government's motion. So I'll pull that out. And let
12 me -- let me make a few comments and make sure you
13 know where I am or what I know on this.

14 What I understand the situation to be is
15 that the Government wants Mr. Davis off the case.
16 Now, y'all may feel a little softer about it than
17 your briefing about it, but at least your briefing
18 is, they want him off the case.

19 And I understand, Mr. Davis, that
20 Mr. Martinez is not consenting to you staying on this
21 case and waiving any conflict. It looks to me like
22 it's an actual conflict. Now, you can try to
23 persuade me it's potential, but it looks to me like
24 it's an actual. And we're sitting right here in the
25 same courtroom. That was always William Bennett

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1 Williams' Rule on Conflicts, if you're in the same
2 room, then probably it's an actual conflict. So it
3 seems to me we're probably there. And if you don't
4 have a defendant that's going to waive, I'm not sure
5 I can force it down. I think I can take a waiver of
6 an actual conflict. I have done a little bit of
7 research, and it looks like I can take a waiver of an
8 actual conflict. But I'm not so certain I do a cram
9 down of an attorney over an objection. So I'm
10 concerned. I'll put that it way. I'll be
11 open-minded, but those are my thoughts.

12 So, Ms. Armijo, if you wish to speak in
13 support of it. Let me make sure I've got a yellow
14 pad. I may have walked out of my -- I think I had a
15 white pad on the desk, if you could just bring it to
16 me.

17 Are you a little softer than your motion?

18 MS. ARMIJO: Well, I wish I were softer
19 than the motion, but I think that it is a true issue
20 in this case.

21 THE COURT: Tell me what you're concerned
22 about. You think Mr. Davis is going to end up
23 being -- cross-examining Mr. Martinez; is that your
24 worst fear?

25 MS. ARMIJO: Well, looking at Document

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1 1164-1, he says, "It is my intent to cross-examine
2 all Government witnesses, including Mr. Martinez, to
3 the best of my ability in a manner best suited to Mr.
4 Herrera's defense." And that is a sworn affidavit by
5 him. So I believe I do have to go with the idea that
6 he will, in fact, cross-examine Mr. Martinez.

7 THE COURT: It looks to me like that would
8 fall into the category of an actual conflict, not
9 just a potential conflict; right?

10 MS. ARMIJO: I agree, Your Honor. And I
11 think that what's important is -- especially
12 important in this case -- is the fact that he
13 represented Mr. Martinez on an SNM murder.

14 Mr. Martinez will be testifying in the
15 trial that Mr. Herrera is set to be tried, the first
16 group, the Javier Molina murder and the other
17 conspiracy murders. He will be testifying in that
18 case. He will be talking about the SNM. He will be
19 talking about the racketeering activities, et cetera.
20 And as part of that, he will be talking about murders
21 that he committed. Specifically, he killed a person
22 with the last name of Cavalier, at the Metropolitan
23 Detention Center.

24 THE COURT: Is that the one that Mr. Davis
25 represented him on?

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1 MS. ARMIJO: Yes. That's the one that's
2 the true issue. He actually represented him on two,
3 I learned this morning. He represented him on two
4 murder cases. One of them Mr. Davis got off on
5 because he had a conflict. Mr. Martinez was charged
6 with killing a police officer.

7 THE COURT: Mr. Davis got off that case?

8 MS. ARMIJO: Because he had a conflict,
9 yes. So apparently Mr. -- and Ms. Milner can give
10 more specifics, because I just found out about this
11 one this morning. We based our conflict based upon
12 the J & C in his Cavalier murder case. But I learned
13 this morning that he represented Mr. Martinez on two
14 murder cases. One of the murder cases he got off on
15 because, I believe, shortly before trial, one of the
16 witnesses was a former client of Mr. Davis'.

17 Then he went on to represent him in the
18 other murder case, which is the case that I was
19 telling you about, which will be testified about.
20 And there is another person, the co-defendant that
21 was charged in this case, that has some involvement
22 in that murder as well. He's not one of these
23 gentlemen here today. But one of the co-defendants
24 that may be -- well, is expected to testify as well,
25 was involved in that murder.

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1 So we have Mr. Martinez testifying about
2 this murder, talking about it with -- talking about
3 other people involved, other SNM gang members. And
4 he will also be testifying that Carlos Herrera is an
5 SNM gang member that he knows. So those are things
6 that he will be testifying about.

7 I'm sure that the defense team, Herrera
8 defense team, may question him about how he knows
9 Carlos Herrera, how he knows he's a gang member. I'm
10 sure they'll test that, you know, to the best of
11 their ability cross-examine him on all of his
12 testimony regarding the gang, the enterprise, the
13 racketeering activities, about the previous murders
14 that he committed, which Mike Davis was involved in
15 two of them; one that he already got off on because
16 of the conflict.

17 And so it does go to the heart of the
18 matter. I anticipate Mr. Davis will come up here and
19 say, Well, Your Honor, I take back number 13, that I
20 don't cross-examine Mr. Martinez. And that will take
21 care of it. And maybe I'll firewall myself off this.

22 But here's -- but where does it stop? The
23 reason that I mentioned that there will be another
24 witness involved in that murder that he represented
25 him on testify, is that does that mean, then, that

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1 Mr. Davis does not cross-examine -- it's Gerald
2 Archuleta -- Gerald Archuleta, because Mr. Martinez
3 will be testifying about him? Do we take him off of
4 that and firewall him off of that? What about
5 closing arguments, when he wants to talk about the
6 veracity of Mr. Martinez' testimony, then does that
7 mean he isn't allowed to argue that.

8 The fact that he indicates he doesn't
9 really have an independent recollection of
10 communications with Mr. Martinez, what if in the
11 middle of his testimony things start to resonate, he
12 starts to remember, oh, yeah -- because, again, it
13 was an SNM hit. The victim was strangled. And for
14 the very reasons that we have motives of the murders
15 in this case.

16 So I just don't know that -- I do think
17 it's an actual conflict, and I don't know that it's
18 such that we can separate him and cure the problem.

19 And Mr. Martinez has told me through his
20 attorney that he is not willing to waive the
21 conflict. One of his concerns is that Mr. Davis
22 knows how to push his buttons. And so he feels --

23 THE COURT: I'd like explore that a little
24 bit.

25 MS. ARMIJO: Yes. And I'm sure that was

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1 what was communicated to me by his attorney, that
2 Mr. Davis and he did have a close relationship. He
3 knew how to push his buttons, and so it would impact
4 him being cross-examined by him.

5 THE COURT: All right. So you want him
6 off?

7 MS. ARMIJO: I don't want him off. I
8 believe the law calls for him to be off.

9 THE COURT: All right. Okay. Thank you,
10 Ms. Armijo.

11 MS. ARMIJO: Thank you.

12 THE COURT: All right. Mr. Davis, did you
13 know you pushed his buttons, huh? Do you do that
14 with all your clients?

15 MR. DAVIS: Well, I can tell you this: I
16 like to think I have a close relationship with all of
17 my clients, and I get to know them well.

18 Unfortunately, once 17 years passes, I have very
19 little, if any, recollection, which is the case here.

20 THE COURT: You don't want to admit that in
21 open court, that you're getting older and can't
22 remember.

23 MR. DAVIS: I don't think --

24 THE COURT: That's not good for your career
25 here.

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1 MR. DAVIS: I don't think I could deny the
2 gray hair, and I look at some of my colleagues --

3 THE COURT: Let me tell the marshals
4 something real quick. We're going to take our break
5 at 12:30. So if you want to plan for the defendants
6 to eat around there, it will be 12:30.

7 Go ahead, Mr. Davis.

8 MR. DAVIS: In any event, Judge, first off,
9 I take issue with the Court's position. There is no
10 actual conflict. An actual conflict --

11 THE COURT: Tell me, if this is not an
12 actual conflict, what an actual conflict is.

13 MR. DAVIS: An actual conflict would be, is
14 if I represented a witness in the case in another
15 separate legal matter, and in the course of that
16 legal matter that I would receive some confidences
17 that somehow I could use to benefit Mr. Herrera.

18 THE COURT: But isn't that the fear, is
19 that, whether you remember it or not, you have some
20 information that, if your memory gets refreshed or
21 something like that, that you could use against Mr.
22 Martinez, if he takes the stand?

23 MR. DAVIS: Well, first off, that's not an
24 actual conflict. That would be a potential conflict.
25 And so it's our position that there is no actual

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1 conflict. So the only thing we're arguing about is
2 whether there is a potential conflict. Now --

3 THE COURT: Here's the problem: Even if
4 it's a potential conflict, isn't it going to come at
5 a point that I -- I'm going to get to a point where
6 if you're actually cross examining Mr. Martinez, I --
7 boy, I'm going to be in a hard spot to rectify
8 situations at that point.

9 MR. DAVIS: Well, Judge, the only way that
10 that would be an issue is if I had client confidences
11 with Mr. Martinez that I was going to somehow use
12 against him in my cross-examination.

13 What I'm telling the Court, and with
14 everything Ms. Armijo just told you, everything I
15 know about Mr. Archuleta today is all in the public
16 record. And the case law is very clear on this. If
17 a person has knowledge of things that are in public
18 record, that doesn't rise to the level of a conflict.

19 I have no recollection of my conversations
20 with Mr. Martinez.

21 THE COURT: But that's not -- I mean, I've
22 been in your position before, I couldn't remember if
23 I represented somebody, or much about the case, but
24 with all due respect, isn't that just irrelevant? I
25 mean, there is nothing in the cases that say we're

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1 going to ask the attorney whether they remember the
2 client or remember the matter, and determine a
3 conflict. That's not a relevant issue, is it?

4 MR. DAVIS: Well, what is a relevant issue
5 is that Mr. Herrera has a right to his choice of
6 counsel, and he's chosen me.

7 THE COURT: Well, we're all CJA lawyers
8 here. So there is not much choice.

9 MR. DAVIS: Right. But he wants me as his
10 lawyer.

11 THE COURT: Well, that's great. You're a
12 good lawyer.

13 MR. DAVIS: Right. And so he has a right
14 to have me. And the presumption is that it's the
15 Government that has to show that --

16 THE COURT: I'm not seeing a right here.
17 Where are you getting that right?

18 MR. DAVIS: Well, Judge, I'm reading from
19 Weed versus U.S., and it says --

20 THE COURT: Well, if he wants to retain you
21 or something, we've got a different issue. But as
22 long as it's CJA, and we're trying to avoid problems
23 on appeal in a 2255, it's kind of my problem, isn't
24 it?

25 MR. DAVIS: Well, I don't want to quibble

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1 with the Court over his choice of counsel, whether it
2 relates to being retained or CJA. I'm not being
3 forced upon him. I think he would stand up and tell
4 you he wants me to represent him.

5 But it's our position that, in fact, this
6 is not an actual conflict. It's only a potential
7 conflict. And in order to be a potential conflict,
8 the law is clear that you have to establish that two
9 things -- one of two things -- one is that it comes
10 from the same transaction, which this isn't the same
11 transaction. This is a murder that occurred over 17
12 years ago.

13 THE COURT: But isn't it going to be a
14 predicate act here?

15 MR. DAVIS: Well, Judge, the law is also
16 clear that the fact that there is some superficial
17 resemblance to the case at matter does not rise to
18 the level of a conflict. And that's what we have
19 here. There is a lot of stuff about what I have
20 previously represented. And frankly, you're going to
21 find, I think, with a lot of my colleagues that have
22 been in practice for at least the 35 years that I've
23 been, and others have been here longer, this
24 routinely comes up, where we'll end up representing
25 somebody who may have been a witness in a case many

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1 years ago, in a case that we may have had. And this
2 happens quite frequently. And so long as we're not
3 revealing client confidences --

4 THE COURT: I've certainly had those
5 issues. I've been down here in Las Cruces and been
6 in this room and taken waivers. But don't we have a
7 problem here that makes it very difficult, given that
8 Mr. Martinez won't waive it?

9 MR. DAVIS: Well, he wouldn't waive if a
10 conflict existed, but there is no conflict. That's
11 why I'm trying to get to the point, Judge, there is
12 conflict, there is no actual conflict because we
13 don't have the situation --

14 THE COURT: But even if it's a potential
15 conflict, he's not going to waive it.

16 MR. DAVIS: But in a potential conflict you
17 have to show this: You have to show it was in the
18 same transaction or that it was substantially
19 related. And the case law being substantially
20 related -- because it's clearly not the same
21 transaction -- is clear. And I'm reading from the
22 disciplinary commentary to Rule 16-109C, quote,
23 "Matters are substantially related for purposes of
24 this rule if they involve the same transaction or
25 legal dispute." And again superficial resemblance

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1 doesn't amount to this. "Or if there is otherwise a
2 substantial risk that confidential factual
3 information, as would normally have been obtained in
4 a prior representation would materially advance the
5 client's position in a subsequent manner."

6 And what I'm categorically saying is I
7 don't have any such confidential information. So
8 this whole idea of a conflict is a fabrication. It
9 simply doesn't exist, Judge. I don't have any
10 confidences, knowledge of my representation of Mr.
11 Martinez.

12 In fact, Ms. Armijo brought to my attention
13 apparently -- and I vaguely remember this case where
14 I represented him on, and I believe it was about the
15 same time, and I was representing him on this murder
16 with Mr. Cavalier, that -- that I apparently
17 represented him on this other case. And in that case
18 I had an actual conflict, because I was in the
19 process of representing -- his probation officer, I
20 learned, was going to be a witness in the case. And
21 so I had to get off. That's an actual conflict that
22 I, in fact, had.

23 THE COURT: Are you standing?

24 MS. MILNER: Ms. Armijo wanted to talk to
25 me, but I guess she changed her mind.

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1 THE COURT: Do you need to talk?

2 MS. ARMIJO: No, Your Honor, it's okay.

3 THE COURT: All right. Go ahead,

4 Mr. Davis.

5 MR. DAVIS: So that's my position. I don't
6 have any conflict.

7 Now, if the Court takes a different
8 position, although I disagree, and I've made my
9 record here, I think, this morning. But as the Court
10 knows, I have co-counsel in the case, Ms. Bhalla.
11 And Ms. Bhalla, the courts are very clear on this as
12 well, if you have co-counsel who doesn't have the
13 conflict, that she can be allowed to do the
14 cross-examination on Mr. Martinez. And I tell you
15 for the record I would object to that. Now, it could
16 be Ms. Bhalla and I have decided how we're going to
17 handle the witnesses in this case. I can tell that
18 categorically, Judge, and perhaps as our decision
19 from trial strategy we would want her to do the
20 cross-examination of Mr. Martinez anyway. But I
21 don't want my hand forced to do that. I think I
22 should have the ability to make that decision, and we
23 should make that decision together.

24 But if the Court is concerned, you can
25 obviate any concern of a conflict by simply allowing

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1 her to conduct the cross-examination.

2 And that's our position.

3 THE COURT: All right. Thank you,

4 Mr. Davis.

5 MR. DAVIS: Thank you, Judge.

6 THE COURT: Ms. Milner, do you want to
7 speak on this?

8 MS. MILNER: Beg your pardon?

9 THE COURT: Do you want to speak on this?

10 MS. MILNER: No, Your Honor.

11 THE COURT: I've got a few questions. Why
12 don't you come up to the podium, okay?

13 MS. MILNER: Do you want my client here as
14 well?

15 THE COURT: No, let's just you and I talk
16 here. Seriously, what do we mean here by Mr. Davis
17 pushes his buttons? What is the conflict?

18 MS. MILNER: I guess, during the course of
19 their relationship -- I mean, they were difficult
20 cases, I'm sure that there were issues. But Mr.
21 Martinez made it very clear to me, once he realized
22 that Mr. Davis was on the case, that he had concerns
23 that based on their relationship, Mr. Davis would
24 know how to push his button, without disclosing what
25 those actual issues were.

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1 THE COURT: Okay.

2 MS. MILNER: And he's not prepared to
3 waive. He does not want to be crossed by Mr. Davis.

4 THE COURT: Well, you've been representing
5 Mr. Martinez in this case. You're also an officer of
6 the court. Are you concerned about Mr. Davis being
7 on this case?

8 MS. MILNER: Yes, Your Honor, I am.

9 THE COURT: All right. Anything else you
10 or Mr. Martinez wants to tell the Court about this
11 motion? Anything else, Mr. Martinez?

12 THE DEFENDANT: No, sir.

13 THE COURT: All right. I want to make sure
14 I have your views. So if you want to tell me, or if
15 you want to tell Ms. Milner and she tell me.
16 Anything else? Okay.

17 All right. Anything else, Ms. Milner?

18 MS. MILNER: No. Thank you.

19 THE COURT: All right. Thank you, Ms.
20 Milner.

21 All right. Ms. Armijo, I'll give you the
22 final word on this.

23 MS. ARMIJO: A couple of things, Your
24 Honor. Substantially related: The murder in this
25 case is not the only element the United States has to

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1 prove. It's a VICAR --

2 THE COURT: The what's not the only
3 element?

4 MS. ARMIJO: The murder. So it is a
5 violent crime in aid of racketeering. We have to
6 prove that there was an enterprise, in this case the
7 SNM. We have to prove our interstate commerce. We
8 have to prove racketeering activity, the murder, and
9 the motive in the case.

10 And I'm just going to give the Court an
11 example of how -- why Mr. Davis' representation is
12 important. He says that, you know, it was just a
13 murder case. But in that case, as I indicated
14 before, it was an SNM hit. But if I am recalling --
15 there could be something that Mr. Martinez told
16 Mr. Davis back during that representation. For
17 instance, he could have said: It isn't an SNM hit,
18 it was a personal beef. I just wanted to kill this
19 guy. So I'm taking the rap for anybody involved.
20 Nobody else was involved. I'm pleading guilty. And
21 this was not gang related.

22 And I don't know if that conversation took
23 place. But let's say for argument's purposes it did
24 take place. And now Mr. Martinez is taking the
25 stand, now that he is cooperating, and he's going to

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1 say that this was an SNM hit, and he's going to name
2 other people that committed the crime with him, that
3 were co-conspirators. And Mr. Davis then could say,
4 You know what, he told me something different. He
5 told me that it wasn't an SNM hit. And that's where
6 the issue comes up.

7 There were two other attorneys that were
8 removed in this case, early on, before Your Honor
9 took over the case, in which the conflict wasn't
10 nearly as obvious in this case. So it shouldn't be a
11 surprise, certainly, to anybody on this case.
12 Although I think that was probably before Mr. Davis
13 got on. I know that other counsel know about the
14 issue. So it shouldn't certainly be a surprise that
15 this is an issue and that we needed to bring it up.

16 THE COURT: Well, I will not rule on it
17 today, Mr. Davis. I will take it under advisement.
18 I will -- at the end of tomorrow, I will be asking
19 people for a batting order. Maybe this is the first
20 thing that goes in the batting order. And I'll take
21 a hard look at what you've said. I don't know the
22 rules on actual and potential conflicts well enough
23 to make an informed decision. So I will -- I'll get
24 you an opinion on it. But my inclination is you
25 better get your house in order for a change of

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1 counsel. But I'll give it a hard look.

2 MR. DAVIS: Can I be heard, please?

3 THE COURT: You may.

4 MR. DAVIS: Judge, let me restate. I have
5 no recollection of --

6 THE COURT: But I guess I just don't think
7 that's relevant. Now, you may find a case that says
8 that a lawyer's memory is important on this issue.

9 But I don't know of one.

10 MR. DAVIS: Judge, what's relevant is
11 client confidences. And what I'm telling the Court,
12 that's the whole issue of conflict of interest.

13 THE COURT: But if he's been talking to you
14 and he remembers the confidences, then kind of --
15 it's irrelevant whether you remember them or not.

16 MR. DAVIS: It's not relevant whether the
17 client remembers stuff. It's whether the attorney,
18 who is potentially --

19 THE COURT: But it's his interests that are
20 at stake. If he's sitting there thinking, I bet old
21 Mr. Davis remembers that, I told him that --

22 MR. DAVIS: But what I'm telling you is, I
23 don't remember anything. And the things that Ms.
24 Armijo has told you about SNM, those are in the
25 police reports. That was in the discovery. That's

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1 public record that all the attorneys have, that
2 they're going to use to cross-examine Mr. Martinez
3 on.

4 THE COURT: Well, when you get back to
5 Albuquerque, you shoot me any cases that tell me that
6 a lawyer's memory is relevant to this issue. If you
7 find them, I'll take a look at them.

8 MR. DAVIS: It's not the lawyer's memory,
9 Judge, it's the fact that I don't have any client
10 confidences that I recall. There were none there.

11 THE COURT: If you've got a case that says
12 that, I'll take a look at it.

13 MR. DAVIS: The cases say -- are all about
14 conflicts exist if you're going to reveal client
15 confidences. What I'm telling the Court is I don't
16 have any client confidences to reveal.

17 THE COURT: And I'm sure there have been
18 attorneys that have thought the same. If you can
19 find a case that says that's relevant, I'll take a
20 hard look at it.

21 MR. DAVIS: Thank you, Judge.

22 THE COURT: Thank you, Mr. Davis.

23 MS. ARMIJO: Your Honor?

24 THE COURT: Yes.

25 MS. ARMIJO: Along those lines, there is

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1 another potential conflict that the parties are aware
2 of, and I spoke to both parties today, and I can
3 explain it to the Court. We did not file a notice,
4 but I wanted the Court to at least be aware of it,
5 because I know that Mr. Blackburn is a very difficult
6 person to get ahold of.

7 THE COURT: Get along with or get ahold of?

8 MR. BLACKBURN: Both.

9 MS. ARMIJO: And I believe that, from what
10 he told me this morning, Mr. Blackburn represented
11 Mr. Daniel Sanchez in a habeas corpus -- is that
12 right -- matter in which I think he was retained by
13 Mr. Sanchez' brother, Ron Sanchez. And so I don't
14 know the nature of it. I don't know if it is
15 something that would be SNM related or anything else.
16 So I'm at a loss. That's why we didn't file a
17 motion. I did email him several times to try and get
18 clarification. Because Mr. Jewkes is actually the
19 one that brought it to our attention.

20 I was told this morning that I know -- I
21 believe Mr. Garcia waived something. But I can't
22 provide the Court with more information. I don't
23 know if Mr. Sanchez is going to waive any potential
24 conflict. And I don't even know the nature of the
25 habeas corpus. But we are -- Mr. Garcia's trial is

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1 set to be in the latter part of it, but I think that
2 this is something that we do need to at least address
3 for the record. I think the representation was for
4 four years; is that correct?

5 MR. BLACKBURN: A little more than that.

6 MS. ARMIJO: So I think this is an issue
7 that -- I'm at a loss since I don't know what it is,
8 and I would ask that maybe Mr. Blackburn file
9 something with the Court, at least that we could
10 figure out if there is an actual or potential
11 conflict, and if it is waive-able. And that is why I
12 haven't filed anything, Your Honor.

13 THE COURT: Well, do you want to speak to
14 that, Mr. Blackburn?

15 MR. BLACKBURN: Sure, Your Honor. Your
16 Honor, and I discussed this with the Government. I
17 think, at the first or second arraignment I spoke
18 with Mr. Castellano when we were here, because Gary
19 Mitchell was involved in the case. So, yes, I
20 represented Mr. Sanchez and his brother, Ronald
21 Sanchez, as it relates to a habeas from a murder case
22 that was in Los Lunas, New Mexico, that dealt with a
23 fight at a bar. I did not represent -- this was I
24 think either 1990 or 1989. I can't remember the date
25 of the case. I did not represent him at the trial.

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1 He was represented by Ben Gonzalez, and Reggie
2 Storment was appointed to represent him.

3 On appeal, the appeal was handled by Gary
4 Mitchell. They retained Gary Mitchell to do the
5 appeal to the New Mexico Supreme Court. At the New
6 Mexico Supreme Court they lost, and then they came to
7 see me about a habeas, both of Sanchezes. Now, I
8 represented them on the habeas.

9 THE COURT: What was the nature of the
10 habeas?

11 MR. BLACKBURN: The nature of the habeas
12 was ineffective assistance of counsel in that the --
13 there were two issues, basically two main issues.
14 The case is in front of Judge Pope, and he
15 transferred the case from Los Lunas to Belen due to
16 some pretrial publicity. The victim's advocate for
17 the District Attorney's Office in Los Lunas, when
18 they went to trial in Grants, the sister of the
19 victim's advocate that had been with the family for
20 the victims in Los Lunas, ended up being on the jury
21 panel, and was not stricken by the defense lawyers,
22 even though they were aware of that particular
23 situation.

24 THE COURT: I didn't pick juries in Los
25 Lunas without local counsel.

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1 MR. BLACKBURN: The case is in Grants.

2 THE COURT: Oh, okay.

3 MR. BLACKBURN: So the case goes to Grants.

4 THE COURT: I didn't pick one in Grants
5 either.

6 MR. BLACKBURN: Okay. So anyway --

7 THE COURT: There was always a cousin on
8 the jury.

9 MR. BLACKBURN: Well, in particular, it was
10 the sister of the victim's advocate. So, anyway --
11 and it wasn't like they ran out of challenges. They
12 only used eight of their challenges on a murder case.

13 Anyway, that was one of the issues. There
14 was another issue about preparation as it relates to
15 an expert. That was the issue. Judge Pope was the
16 judge in the case. And based upon the pleading
17 itself, and the fact that Judge Pope was the --
18 because you go back in state cases in front of that
19 judge, at the time he granted the habeas for an
20 evidentiary hearing.

21 One of the reasons why the case took so
22 long was there was a few issues involving Judge Pope
23 that we don't need to go into on the record here.

24 THE COURT: That would be fun.

25 MR. BLACKBURN: Well, do you want to know

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1 the time that he --

2 THE COURT: No, no.

3 MR. BLACKBURN: No. But there was -- so
4 eventually, after he took a 30- or 60-day hiatus,
5 when he came back, he was requested, I think, by the
6 Supreme Court to get rid of some of his cases. And
7 the first case he got rid of was this case.

8 And the case then went to Judge Davis out
9 in Sandoval County, who was not happy about that,
10 because obviously, it makes a difference when you're
11 the judge that heard the case. And this was back in
12 the days where everything was done on tapes. So
13 Judge Davis was not going to go back and listen to a
14 week's worth of testimony, and requested that we
15 transcribe those tapes.

16 And it took about six months to get that
17 done, because the District Attorney's Office wanted
18 to use Judge Camille Martinez' court reporter to do
19 it. So this was sort of something she did after
20 hours, because she could do it for a minimal amount.
21 And that took forever. By the time that was done,
22 the Sanchezes decided to hire somebody else, because
23 there was a family member that was a lawyer, who
24 could do this. And I did not proceed any further.

25 The case went to an evidentiary hearing. I

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1 had nothing to with the evidentiary hearing. I
2 turned everything over to another lawyer who did the
3 evidentiary hearing. And that this was basically it.

4 We raised this -- I know that Mr. Mitchell
5 and I talked to the Government briefly at one of the
6 first hearings about that. So that's what the case
7 is about.

8 I had talked to Mr. Jewkes, I think that
9 particular day when I came down here -- I think it
10 was Mr. Garcia's initial arraignment, in 2016, in
11 January 2016. Because he wasn't arraigned with the
12 rest of the people. He was out of custody for a
13 number of years before he was brought in on this
14 case. He was arrested in Denver. And it took them
15 like 45 days to get him down here.

16 So that was basically it. I've explained
17 all the circumstances to my client, Mr. Garcia. And
18 he has had no objection to me going forward. This
19 has been vetted back and forth with Mr. Sanchez'
20 lawyers, and they know the circumstances. And it was
21 my understanding from the beginning that they had no
22 objection to me --

23 THE COURT: And you're in the April trial
24 and Mr. Sanchez is in the January trial?

25 MR. BLACKBURN: Yes, Your Honor. So if the

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1 Court needs to know any more, or --

2 THE COURT: Well, let me ask Ms. Armijo --
3 direct your questions to me -- but is there anything
4 else you want to know from Mr. Blackburn about that
5 case? Did that give you enough information?

6 Mr. Davis, look at all that memory. And
7 Mr. Blackburn could keep going.

8 MR. DAVIS: I just remembered I forgot to
9 make my record on something. So I'd like to be
10 heard.

11 THE COURT: Okay. I'll give you a chance.

12 MS. ARMIJO: And, Your Honor, I think that
13 the fact that it is -- that incident is not part of
14 the SNM; it's not an SNM-related activity. So I
15 don't think that it would be necessarily relevant.
16 They are in two different trials, so I don't
17 anticipate -- if Mr. Sanchez took the stand for Mr.
18 Blackburn to cross-examine him. So I don't believe
19 it's an actual conflict. If anything, it's a
20 potential, and our position would be that, you know,
21 quite possibly to save the record for future
22 purposes. If there is a waiver by both parties, then
23 that should take care of the issue.

24 THE COURT: Okay. Thank you, Ms. Armijo.

25 Mr. Jewkes -- why don't I get this one

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1 taken care of, and I'll come back to you, Mr. Davis.

2 Mr. Jewkes, do you have any thoughts on this? Did
3 you talk to Mr. Sanchez about it?

4 MR. JEWKES: No, Your Honor. We were
5 unaware that it was coming up today. We will.

6 THE COURT: All right. Do you know all
7 that? Was that new to you, or did you have knowledge
8 of it?

9 MR. JEWKES: Yes. What Mr. Blackburn just
10 explained to the Court is something that he explained
11 to me. I'm not sure if Ms. Jacks -- no, it was the
12 first arraignment. Yes, that's pretty much the way
13 it went down.

14 THE COURT: Okay. So you're going to talk
15 to -- you're getting a request here from Ms. Armijo
16 to get a waiver. You haven't had a chance to talk to
17 Mr. Sanchez about that yet?

18 MR. JEWKES: No, Your Honor. We will --

19 THE COURT: Okay.

20 MR. JEWKES: -- in short order.

21 THE COURT: All right. Thank you,
22 Mr. Jewkes.

23 Anything else on that, Ms. Armijo?

24 MS. ARMIJO: No, Your Honor. The person I
25 spoke to was Ms. Jacks this morning about it.

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1 THE COURT: All right. Anything else you
2 want to say on that, Mr. Blackburn?

3 MR. BLACKBURN: No, Your Honor.

4 THE COURT: All right. So I'll just wait.

5 And why don't I let you drive things, Ms. Armijo.

6 Since you're wanting the waiver, why don't you get
7 back with Ms. Wild, and tell her what you want and
8 when you want it. And then, if everybody is on
9 board, we'll do a colloquy. If not, then we'll see
10 what the problem is at that time.

11 All right. Mr. Davis.

12 MR. DAVIS: Thank you, Judge. Judge, I
13 just want to perfect my record with regard to having
14 my second counsel do the cross-examination on Mr.
15 Martinez. That really solves any conflict issue.
16 The case law is very clear on that. It's in my
17 response and set forth all the case law. I can tell
18 you that -- whether you want to take testimony from
19 Ms. Bhalla, but I can tell you that we have not
20 discussed anything regarding Roy Martinez, other than
21 what's set forth in my response and my affidavit,
22 which I've stated here clearly I just don't remember
23 anything about him.

24 Despite Mr. Blackburn's good memory, I
25 don't have his memory. And I don't think he's had my

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1 caseload over the last 17 years, or so.

2 THE COURT: Oh, oh, oh.

3 MR. DAVIS: My caseload is much higher than
4 his. I've had a state public defender contract for
5 the last 20 years, and it keeps me pretty busy, so --
6 and Mr. Martinez' case did not go to trial. They
7 were both state cases where I received all the
8 discovery, including Grand Jury transcripts. We did
9 interview witnesses. And most of my contact was with
10 witnesses. The district attorney on the case is
11 dead. It's just -- the case is just buried to me.

12 But I ask the Court to really consider
13 that.

14 THE COURT: I will.

15 MR. DAVIS: Even if you find that I can't
16 do anything, I should be able to stay on the case,
17 Judge. Mr. Herrera is entitled to the continuity of
18 counsel. And Ms. Bhalla can adequately cross-examine
19 Mr. Martinez instead of me.

20 THE COURT: Well, I'm not eager to knock
21 you off, Mr. Davis.

22 MR. DAVIS: I would hope not, Judge.

23 THE COURT: I'll take a hard look at it.

24 MR. DAVIS: Thank you.

25 THE COURT: All right. Let me get a little

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1 organized here. If nobody has anything better, why
2 don't we talk about maybe the motion for extension of
3 time to provide expert witnesses and notices and
4 reports that Mr. Baca filed. Do you want to take
5 that on?

6 MR. LOWRY: Your Honor, I think we've
7 discussed that with the Government. That's a moot
8 point. We've all been satisfied.

9 THE COURT: All right. Can you do this for
10 me, to help me clean up my docket: Can you file a
11 notice -- you don't need to file another motion, just
12 file a notice withdrawing this motion.

13 MR. LOWRY: Absolutely, Your Honor.

14 THE COURT: Is that agreeable to you, Ms.
15 Armijo?

16 MS. ARMIJO: Yes, Your Honor, it is.

17 THE COURT: Anybody have an objection to
18 that? All right. Just file a notice, and we'll put
19 that aside then.

20 MS. MILNER: Your Honor?

21 THE COURT: Yes, Ms. Milner. Do you want
22 to be excused?

23 MS. MILNER: Yes, Your Honor.

24 THE COURT: All right. Any objection to
25 Ms. Milner being excused, and probably Mr. Martinez

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1 being excused? All right. Hearing none, Ms. Milner,
2 thank you for your assistance. Mr. Martinez, have a
3 good day.

4 (Ms. Milner and Mr. Martinez left the
5 courtroom.)

6 THE COURT: All right. So let's take up
7 then the motion for timely discovery of Giglio
8 materials. This will be Document 1163.

9 Let me speak a little bit about discovery.
10 And I've got great respect for all the counsel in the
11 room, so what I'm about to say is not meant to
12 criticize anyone. But we've got to get real. We're
13 getting into that wingspan of a trial here. So we've
14 got to get very real.

15 We've got Mr. Garcia very close, Chris
16 Garcia is very close to trial on the drug thing. I
17 went through about 20 motions to get ready -- I think
18 it was 21 -- which is the exact number I have teed up
19 today to get ready for that trial -- 20 today, 21
20 then. And I'm not being critical here. Mr. Garcia,
21 I don't think won any of the motions. A lot of what
22 I'm seeing are overlaps from that preparation for
23 that trial in this trial. Now, part of the reason he
24 didn't prevail there is because I didn't think that
25 material was relevant to that case. But it might be

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1 relevant here, so I'm going to keep a very open mind.

2 But at the same time, putting Mr. Garcia
3 aside, Chris Garcia, a lot of you defense lawyers are
4 joining in on those motions. That's fine, you can do
5 that. But you can get buried behind that train. And
6 that's all we can do here is do Mr. Chris Garcia's
7 motions. I can do that, two days here, three days at
8 Thanksgiving, most of the month of December, most of
9 the month of January. So I'm not criticizing anybody
10 and what their strategy is.

11 But if you want Mr. Chris Garcia to run the
12 show, that's your call. If you want to get your
13 stuff ahead of that you're going to need to speak up
14 and tell me that you want your stuff first.
15 Otherwise, I'm just going to take them in order.

16 Now, let's talk a little bit about
17 discovery. I think you know that I try to give
18 people their day in court, and I've tried to be
19 patient and tried to plow through this discovery.
20 Ultimately, however, I have to depend upon the United
21 States to do their job, to provide Brady, Giglio, and
22 Rule 16 information to you.

23 Now, Mr. Garcia can file a 45-page motion
24 to compel, and we can go through all those things.
25 But ultimately, it's that table over there that's got

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1 to do its job to produce the information under Brady,
2 Giglio, and Rule 16, to get it in your hands to try
3 the case.

4 Now, we can prod, we can push, we can bring
5 things to their attention. But 45 pages, I don't get
6 that, guys, in a civil case. You know, they don't do
7 that anymore. So a criminal case in which you're
8 sitting there dictating every possible document you
9 can possibly think of, like it's a civil case, you
10 know you're not going to get that. You've got to
11 make the showing under those cases that you're going
12 to get it. Otherwise, we're relying on them.

13 So I'll be patient. I will listen. But I
14 think we know where a lot of that is going. And I
15 say that only because you folks that are behind
16 Mr. Garcia, you may have more important issues than
17 all those motions to compel that Mr. Garcia is
18 preparing and filing. If you don't, if you want to
19 sit here and listen to Mr. Garcia advocate for
20 documents multiple times, we'll do it. But the rest
21 of you are going to have to decide if that's in your
22 best interests. And if it is, I take your word for
23 it. We'll just take all of Mr. Garcia's motions and
24 plow through them. But if it's not, you need to
25 speak up. You need to tell me, Judge, we've got some

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1 more important issues here. We've got motions to
2 suppress. We've got things that need to get us ready
3 for trial. Because the reality is, if we run out of
4 time on all the motions that Mr. Garcia is going to
5 file, they're going to be deemed denied, and we're
6 going to go to trial. And we're going to all rely
7 upon the Government having done work under Brady,
8 Giglio, and Rule 16. If they didn't do their job,
9 we'll find out about it, and people will be in
10 trouble.

11 So I hope that was of some help. I don't
12 mean to be critical. Everybody has got to do their
13 job, and I'm not questioning it. But just take that
14 as an observer here, a somewhat interested observer,
15 and how we're going to get this thing ready for
16 trial.

17 All right. Mr. Castle, were you going to
18 make -- argue on this motion?

19 MR. CASTLE: Yes, Your Honor.

20 THE COURT: Mr. Castle.

21 MR. CASTLE: Before I do, the Court had
22 just made some comments.

23 THE COURT: Sure. I'd love your feedback.

24 MR. CASTLE: Would the Court appreciate it
25 if the defense would discuss amongst each other and

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1 try to give the Court a proposal -- of course, with
2 the Government -- a proposal of what we think are the
3 motions that should be heard, and in what order to
4 the extent we can, with our schedules and things of
5 that nature?

6 THE COURT: Well, I'm not dictating it.
7 But you might -- if what I said prompts some way to
8 help you get ready for trial, you know, I don't want
9 to get form over substance. If there is issues -- if
10 there is issues you want to talk about, let's talk
11 about issues, let's pull them out, and don't get
12 trapped in the motions.

13 Tell me what -- you know, tell me what is
14 concerning you as you get ready for trial that you
15 don't think the Government has done. I think it
16 would be better to pull some key issues out. And
17 some of that stuff, I mean, boy, I -- some of that
18 stuff that I read in that 45-page motion, quite
19 frankly, I don't know what it is. I mean, I think
20 people are being very creative. But it looked a
21 whole lot a civil RFP than it did anything I'm
22 familiar with seeing here in court. And we're all
23 experienced in this room. I just sometimes wonder
24 if, is anybody else doing that in any other case?

25 MS. HARBOUR-VALDEZ: Your Honor, I'm sorry

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1 to interrupt, but --

2 THE COURT: Let me say one thing here. To
3 just respond specifically to Mr. Castle's point.

4 Ms. Wild worked very hard with some of the counsel to
5 get a batting order here. So if you do that, it may
6 conflict with some of the stuff that she and counsel
7 have been doing over the last few days. We put some
8 dates out there. And this is me, so -- but I'm going
9 to probably -- at this point we're not going to --
10 we'll work with counsel to try to make sure motions
11 are heard in a good order.

12 But you're going to have to start being
13 here. You know, these dates are going to become
14 inflexible, and you're just going to have to tell
15 other judges and courts that you've got to be there.
16 We're within that sort of wingspan. So just be
17 careful. I'm not trying to be inflexible. But at
18 the same time it's my job to keep this thing on a
19 track to get it to trial.

20 Now, Mr. Castle, Ms. Harbour-Valdez wanted
21 to say something. Do you want to yield the floor?
22 All right.

23 MS. HARBOUR-VALDEZ: Your Honor, I just
24 wanted to know which motion you were referring to.
25 Because on my list we're talking about 1163 right

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1 now; correct? You're making reference to another
2 motion?

3 THE COURT: The 45-pager.

4 MS. HARBOUR-VALDEZ: Yes. I wasn't sure.

5 THE COURT: Yeah. But a lot of people
6 signed on to it. And I know who wrote it, but a lot
7 of people signed on to it. So I thought I needed to
8 give some general comments. And y'all can dissuade
9 me. I mean, maybe I'm wrong.

10 MS. SIRIGNANO: Your Honor, may I be heard?

11 THE COURT: Well, let me let Mr. Castle
12 decide what we're going to do here. It's his motion.
13 If he wants to argue it, he can. If he wants to
14 yield the floor, he can as well.

15 MR. CASTLE: I'm the person from out of
16 state, so I'm going to yield the floor to the
17 representative of the great State of New Mexico.

18 THE COURT: Okay. Ms. Sirignano.

19 MS. SIRIGNANO: Thank you, Judge.

20 THE COURT: You can get up here close. I'm
21 not going to bite you.

22 MS. SIRIGNANO: Oh, I know that, Judge.
23 We've been doing this too long.

24 For everybody's reference, that's Doc 1267.
25 And I'm happy to pare that down, Judge, that's no

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1 problem. And I appreciate the comment on my
2 creativity, and my firm's.

3 THE COURT: Okay.

4 MS. SIRIGNANO: And for the record, I'm
5 happy to yield the floor to anyone after this. We
6 can take this at the bitter end. And any other
7 co-defendant can go before me. You did state
8 Ms. Wild, Ms. Harbour-Valdez, and I did literally
9 spend two or three days trying to get this line-up
10 teed up. And so if there is anyone unhappy about the
11 order of that, Mr. Garcia is happy to go last. And
12 if, perhaps, we got a response from the Government on
13 these motions, then maybe we'd be able to pare it
14 down, the length of it, and the seriousness of it.

15 And, as you know, the Government is
16 responsible for its own obligations under Brady, Rule
17 16, Giglio, and Jencks. It's just that we are all
18 suffering from discovery issues right now, leading up
19 into January. And so that was my intent. And what I
20 can do is withdraw this document and pare it down, if
21 you'd like, Judge, and get it heard in early
22 December. That's no problem.

23 THE COURT: Well, you don't worry about
24 what I think or want. You've got to represent
25 Mr. Garcia.

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1 MS. SIRIGNANO: Indeed.

2 THE COURT: And I'll trust you to do the
3 best job you can for him. Let's hold that.

4 MS. SIRIGNANO: And I'll yield the floor to
5 anybody.

6 THE COURT: Okay. Let's let Mr. Castle --
7 and it's his motion, if -- like I said, most of these
8 are defendants' motions, so if y'all want to juggle
9 them and bring issues, I'm game.

10 MS. SIRIGNANO: Thank you, Judge.

11 THE COURT: Thank you, Ms. Sirignano.

12 MR. CASTLE: Your Honor, 1163 is titled
13 motion for timely discovery of Giglio material. So
14 there is two issues: The timeliness issue and
15 specific areas of Giglio materials. And I'd like to
16 take those in kind of reverse order.

17 THE COURT: Okay. Why don't we do this:
18 Why don't we take issues, and then, as I've done in
19 the past, after we get through an issue, let me go
20 ahead and hear from the Government, so we can take
21 this a bite at a time. Does that work for you, Mr.
22 Castle?

23 MR. CASTLE: That sounds good.

24 THE COURT: All right. Thank you, Mr.
25 Castle.

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1 MR. CASTLE: Your Honor, there were a
2 couple of issues the Government didn't respond to,
3 and so I don't know whether they're in disagreement.
4 And so --

5 THE COURT: Why don't you list them out,
6 let's see what they say.

7 MR. CASTLE: The first one was that we had
8 indicated that Giglio obligations extend to, quote,
9 "any individual whose statements the Government
10 intends on offering as an exception or exclusion to
11 the hearsay rule." I believe --

12 THE COURT: Help me think through what
13 you're trying to say there. What is your concern?

14 MR. CASTLE: Well, I think the Government
15 is going to take a pretty wide view of what is a
16 co-conspirator statement, for example, because they
17 take a wide view of what the SNM is. And we have the
18 right under Federal Rule of Evidence 806 to impeach
19 the credibility of any declarant. And so, if they're
20 offering that, their Giglio obligations should extend
21 to those declarants, whether they call them as a
22 witness or whether they don't. And, in fact, I would
23 argue their need to give us Giglio materials to
24 people that we don't get to cross-examine at all is
25 probably greater. So they didn't address that. I

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1 don't know if they're objecting to that. But that is
2 our request. And I can give the Court a little more
3 argument if they're going to object.

4 THE COURT: Well, give me a little bit more
5 explanation as to what the issue -- tell me the kind
6 of witness that you're thinking of. A witness in a
7 document that is saying something about a defendant,
8 and you want to impeach that person; is that what
9 you're thinking of?

10 MR. CASTLE: Yeah. They could call one of
11 the informant witnesses. And he says: I was having
12 a discussion with another SNM member, who relayed to
13 me that -- the following. And so, all of a sudden,
14 we have this other individual, and the Government
15 says, Well, you know, maybe establish a foundation
16 where they say: Was this in a discussion of how the
17 SNM should operate in furtherance of the SNM
18 conspiracy? The informant witness says: Yes, it
19 was. We were talking about SNM business, and he told
20 me the following.

21 And so, at that point, we have the right
22 to -- whoever that declarant is, if they've got five
23 felonies, and you know -- or perhaps they're not even
24 a member of the SNM. There might be things that we
25 would impeach that person with if they testified at

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1 trial. But they're not there. And so we need to
2 have that material to bring in under 806.

3 THE COURT: What if they got cumulative
4 evidence that a number of people are saying the same
5 thing? So they are not going to show a witness --
6 they're not going to bring a witness; they're not
7 going to bring a document; there is not going to be
8 any reference to another person, do you still --
9 because that person has knowledge, you think you're
10 entitled to Giglio material?

11 MR. CASTLE: Well, I think we are, because
12 the determination of whether that's going to help the
13 jury is a matter of weight. And whether the Court
14 makes a finding of it's redundant, and also requires
15 the prosecution to know whether all that other
16 information is going to come in in their assessment
17 of Giglio. And I think it's almost impossible to
18 tell how the Court is going to rule, whether this is
19 cumulative or things of that nature. And so the
20 better rule is, if you're going to bring a hearsay
21 statement in --

22 THE COURT: Well, I agree with you. Don't
23 bring the hearsay statement in of that witness. You
24 would agree with me that you don't need the Giglio
25 material for that?

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1 MR. CASTLE: I would.

2 THE COURT: If they decide we've got 10
3 witnesses who will say it, but we're not bringing the
4 tenth in?

5 MR. CASTLE: Right, I agree.

6 THE COURT: All right. Well, let me pause
7 there. Mr. Castellano, Mr. Beck, are you going to
8 handle these? Where are you drawing the line?

9 MR. BECK: I'm handling this one. I agree
10 with both you and Mr. Castle. I think the rules
11 provide that you can impeach a hearsay declarant. So
12 if it's impeachment, it falls under Giglio. But I
13 agree with you that if there is cumulative statements
14 all saying the same thing --

15 THE COURT: And you're not going to bring
16 in the statement, and you're not going to bring that
17 witness, so the jury will never know that there was a
18 person there whose credibility needed to be
19 determined. That's where you're drawing the line?

20 MR. BECK: Right, right. If --

21 THE COURT: Are you drawing it any tighter
22 than that?

23 MR. BECK: No. You put it better than I
24 could.

25 THE COURT: Well, I don't know about that,

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1 but -- all right. Can you live with that line then?

2 MR. CASTLE: Absolutely, Your Honor.

3 THE COURT: All right. And Mr. Beck, any
4 other guidance on that?

5 MR. BECK: No. I agree with the Court.

6 THE COURT: Let me ask this: Is that what
7 you needed is the line, or do you need any sort of
8 rulings on any particular witnesses or statements?

9 MR. CASTLE: No, Your Honor. All we
10 requested was Giglio on witnesses who are going to
11 testify, or declarants whose statements are going to
12 come in at trial.

13 THE COURT: All right. Let's go to the
14 next issue, if that -- let me ask this, since a
15 number of people joined your motion, anybody else
16 want to say anything on that issue? Giglio? Mr.
17 Lowry?

18 MR. LOWRY: Your Honor, if I may real
19 quickly.

20 THE COURT: Yeah. You've got to come up to
21 the mic. Ms. Bean can't hear you.

22 MR. LOWRY: I don't really have much to add
23 to that. But the concern I have on behalf of Mr.
24 Baca is I think the problem we're going to run into
25 is the one we've been confronting. And I think it's

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1 frustrating. The production of discovery is the
2 Government is going to say, Well, we don't know who
3 that tenth person is going to be yet.

4 THE COURT: Yeah.

5 MR. LOWRY: So we don't have the obligation
6 to disclose.

7 THE COURT: I assume that's going to come
8 up a little bit somewhere; right?

9 MR. LOWRY: Yeah. And I think that's
10 really the nub of the issue. So I would beg to
11 differ slightly from Mr. Castle's position. I don't
12 disagree with the sentiments of my learned
13 colleagues, that that might not be relevant or
14 admissible if they're not going to call that person.
15 But my concern is that's going to be a roadblock to
16 the disclosure.

17 And the Court is well aware of this. As
18 you said, we're within the wingspan of trial. And
19 we're already getting enormous document dumps, and
20 electronic data dumps. And this is going to compound
21 that problem immensely if we wait for the Government
22 to fine-tune their prosecution.

23 And I don't think, with all due respect to
24 the Government's obligation -- and I know that this
25 is something they're wrestling with -- but I don't

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1 see the harm in overdisclosing, and let them figure
2 our their tenth person that they're not going to call
3 later, so the defense teams can begin their
4 preparation in utilizing that material now to
5 complete their investigations. As this Court's well
6 aware, we're all running out of time, and we have to
7 create our task list of what's important and what's
8 not.

9 And for some of us in particular counts,
10 this case is all about confidential informant
11 testimony. If there is no tangible evidence, it's
12 going to be a circumstantial case. And this kind of
13 impeachment material is critical to the defense, Your
14 Honor. So that's my concern.

15 THE COURT: All right. I think, though,
16 the line we've drawn is unassailable. What you're
17 saying is it's going to create problems, but you
18 probably --

19 MR. LOWRY: Yes, Your Honor.

20 THE COURT: -- know me as well. I'm not
21 going to force the Government to do disclosures that
22 they're not required to disclose. And I think that
23 this would be getting into the area of forcing them
24 to do something that they're not required to do.

25 MR. LOWRY: I would think --

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1 THE COURT: I'd rather work with the
2 problem than start ordering the Government to do
3 something that I don't really have the power to do.

4 MR. LOWRY: Well, I understand that, Your
5 Honor. But I think there are some witnesses that are
6 indisputable that are going to be called. And I
7 don't see the harm in producing that material now,
8 instead of waiting until the 11th hour. And I'm
9 thinking about Eric Duran, who is one of the key
10 witnesses in this whole Molina case, the Marcantel
11 case. They can't move their case forward without
12 Mr. Duran.

13 THE COURT: Yeah.

14 MR. LOWRY: And to sit on the Brady and
15 Giglio information that's relevant to Mr. Duran is --
16 under the notion that they don't know whether they're
17 going to call him or not is a little disingenuous, I
18 hate to say.

19 THE COURT: All right. Well, let's hold
20 that thought. I know that's an issue, and we'll come
21 back to it. The Government can be thinking about it.
22 But let's get the legal principles out, and then
23 we'll deal with some of the individual stuff as we go
24 along.

25 Mr. Castle.

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1 MR. CASTLE: The only thing I neglected to
2 tell the Court was we heard at previous hearings that
3 the Government intends to offer statements of
4 co-defendants that were against their interests
5 against other co-defendants. We obviously need to
6 impeach those individuals under 806. And so I
7 believe the same Giglio obligation would apply.

8 We heard, I think in another motion -- I
9 don't know which one -- I think Rudy Perez' team
10 asked for their prior bad acts. And the Government
11 is saying: We don't want to give those out. Well,
12 that would be Giglio, if his statements were going to
13 be used against my client, for example.

14 So I think the same obligation goes towards
15 the defendants. Whatever Giglio information they
16 have against a defendant, if they're going to --
17 there is a chance they're going to use that statement
18 against another defendant, they have a Giglio
19 obligation.

20 THE COURT: That seems to make sense to me.
21 Do you agree with it, Mr. Beck?

22 MR. BECK: Yes, Your Honor.

23 THE COURT: Okay. Anything else you need
24 on that issue?

25 MR. CASTLE: No, Your Honor.

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1 THE COURT: All right. Anybody else want
2 to speak on that?

3 All right. Mr. Castle.

4 MR. CASTLE: The second area is what does
5 the obligation extend to? The Government, in their
6 motion, conceded their obligation to obtain Giglio
7 materials that are in their possession and in the
8 possession of the New Mexico Department of
9 Corrections.

10 In a motion that we filed, 1183, which is
11 not scheduled this week, we set forth evidence,
12 fairly significant evidence, that the Joint Task
13 Force, the two New Mexico Joint Task Forces were
14 involved in the investigation into at least the 2001
15 murders, and probably the other murders in this case
16 throughout the time of this indictment. And so I
17 believe that the obligation extends to the Joint Task
18 Force; obviously FBI, any federal agency that has
19 assisted the Government in this case, including the
20 United States Marshal's Office, and also the New
21 Mexico Department of Corrections.

22 And I don't know if they object to that, so
23 I won't make any further argument unless that's
24 necessary.

25 THE COURT: It would seem to that if you've

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1 got a federal person in a Joint Task Force, it
2 probably extends that far. I mean, if the State
3 Police is doing their thing, I don't think it extends
4 that far. If you've got Bernalillo County. But if
5 you got it as part of a task force, it would seem to
6 me, then, that the duty extends. And we've already
7 talked about the corrections department. What do you
8 think about that line?

9 MR. BECK: Well, two things. Number one,
10 this isn't the motion that we're discussing now, so I
11 didn't brief that portion of it. I have some
12 thoughts on it. But I worry about the parade of
13 horribles if we just start going down motions that
14 we're not talking about at this point.

15 Secondly, to address the point that we're
16 not talking about in this motion, I think Your Honor
17 is right, that when we're talking about task force
18 officers involved in this investigation, the SNM,
19 these cases, that would be NMCD, which Your Honor has
20 already ruled; we acknowledge we have custody and
21 control over their records, and we've been proceeding
22 that way.

23 Now, again, we're getting into other
24 motions. But my anticipation of that argument is
25 going to be that a 2001 task force may have been

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1 comprised of different agents. And the federal
2 government may have been more closely aligned with
3 different state agencies than it is at this point.
4 So we may not have the same relationship. So, at
5 this point, in 2017, the case law would reflect
6 differently upon our ability to get custody or
7 control over those records than maybe it would have
8 in 2001.

9 So I anticipate that will be the argument.
10 And I think that's a proper argument.

11 THE COURT: Understanding that problem, can
12 you do it this way, so that the defendants know
13 exactly where the problems are and not. I'm not sure
14 they can do anything about it. But at least -- I'm
15 thinking somewhat protection for you in any 2255, as
16 well as just they know the problem. If it's current
17 task force, or it's task forces that were involved in
18 the prosecution -- in the development of this case,
19 then if you had federal government officials
20 involved, you then have to produce those materials,
21 and we'll assume that you're doing that.

22 If, on the other hand, it is task forces
23 that go back to 2001 and 2002, if because of your
24 working relationships with, you know, say, Bernalillo
25 County Sheriff's Department, you can't get those

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1 documents, and so they are not in your possession,
2 custody, or control in the sense you can pick up a
3 phone and get them --

4 MR. BECK: Right.

5 THE COURT: -- you'll send a letter to
6 defense counsel telling them: I don't have those.
7 We tried, and we do not have that. We don't have the
8 control aspect on that document. That way, they know
9 the problem. And I think it might protect you down
10 the road with a 2255. What would you think about a
11 procedure like that?

12 MR. BECK: I think that's how we've been
13 proceeding. And I think it makes sense logically if
14 you look at the case law. If we have task force
15 agents from NMCD, which we do, then those task force
16 agents can go back to NMCD, and we have that flow of
17 information.

18 If we don't have task force agents from New
19 Mexico State Police or Dona Ana Sheriff's Department
20 or Bernalillo County Sheriff's Department, we don't
21 have that the flow of information, so logically, it's
22 not in our custody and control. And I think that's
23 what we're saying, is that in 2001, there may have
24 been task force agents from NMSP, DASO, that we don't
25 have any longer contacts on. So that's my

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1 distinction. I think we're in the same place, and
2 I'm happy to convey that to defense counsel.

3 THE COURT: And you can tell them on these:
4 I don't have control, these I do?

5 MR. BECK: Yes, Your Honor.

6 THE COURT: Can you live with that line,
7 Mr. Castle?

8 MR. CASTLE: I can live with that line.

9 The one thing I would note is this was in a
10 motion, so it wasn't something from another motion.
11 But I think it's a good line to draw, because of
12 this. The case law says that we cannot subpoena
13 documents that are within the control of the
14 Government. And so, if we subpoena something, and we
15 get the answer, well, you're denied -- and I give the
16 Court an example of that -- we've requested materials
17 under IPRA from the New Mexico Department of
18 Corrections for phone calls that informers have made
19 while they're in custody. And we've been told by the
20 New Mexico Department of Corrections that they don't
21 have them anymore. They gave them to the US
22 Government. We've asked the US Government for them,
23 and they said they don't have them, the New Mexico
24 Department of Corrections has them. That's an agency
25 that everyone's agrees is under the prosecution. We

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1 can't really --

2 THE COURT: I'm not sure they agree. But
3 they fought it hard.

4 MR. CASTLE: That's the law of the case at
5 least.

6 So I think it's a starting point, because
7 then we can know what we can do with subpoenas, and
8 what we cannot do, and we have to rely upon the
9 Government, and looking at 2255 if they didn't. But
10 I think that's a starting point that we can live
11 with.

12 THE COURT: Everybody comfortable with
13 that, as where we're going to draw the line on that
14 material?

15 All right. Next issue, Mr. Castle.

16 MR. CASTLE: Well, the only thing I would
17 ask is that they inform us fairly soon. And I don't
18 know if a suggested date by which they would inform
19 us, but it won't do us any good if it's the day
20 before trial.

21 THE COURT: Mr. Beck, can you propose a
22 date by which you'll send this letter?

23 MR. BECK: Well, I don't know what I'm
24 responding to. So if I get inquiries -- if I get a
25 letter from Mr. Castle or an email, easily an email,

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1 that says: Can you get documents from these
2 agencies, I can respond back to that. But I think
3 there is just a class of which I might not be
4 responding to if I don't have some kind of inquiry
5 from him which agencies he's looking at.

6 THE COURT: All right. Are you agreeable
7 to sending a letter, Mr. Castle?

8 MR. CASTLE: Yes, I can state right now.
9 It's what's said in the U.S. Attorney's Manual, which
10 is "federal, state, and local law enforcement
11 officers and other government officials that
12 participated in the investigation and prosecution of
13 the criminal case against the defendant." That's
14 what their manual says they're supposed to collect
15 and give to us. I can put it in a letter, but it's
16 right there. It's in our motion. We put it in our
17 motion saying: Here's what we want. That's as good
18 as a letter.

19 THE COURT: I read the manual. You know
20 I'm not going to enforce the manual. What do you
21 need, Mr. Beck? Tell Mr. Castle what you're needing
22 that you're not hearing today.

23 MR. BECK: Well, I think we're talking
24 about two different things. If he and I can talk
25 afterwards, and he can just tell me who he's looking

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1 for.

2 THE COURT: Go ahead over there, Mr.
3 Castle. Y'all talk right now.

4 MR. CASTLE: Judge, we're going to give him
5 a list.

6 THE COURT: All right. And then, Mr. Beck,
7 you're going to get a list today. How long would you
8 propose to take to respond to that list?

9 MR. BECK: Considering we're working
10 through the week here, probably Tuesday.

11 THE COURT: All right. Can you live with
12 that, Mr. Castle?

13 MR. CASTLE: Yes, Your Honor. And what I
14 agreed with him was that I would give him a list
15 today. I don't know about all the counsel that
16 joined in this motion. I think that we can say that
17 two weeks from whenever a particular counsel provides
18 their list to the Government.

19 THE COURT: Can you live with that, Mr.
20 Beck?

21 MR. BECK: Two weeks from when we're
22 provided a list? Yes. And so I'm clear on this,
23 because I think we're -- we may have some issues at
24 our table -- we're just asking for a list of who we
25 think is in our custody and control, which of these

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1 agencies; not actual, like, Giglio information?

2 THE COURT: No, this is -- you can correct
3 me if I'm wrong -- what you'll be indicating is on
4 this task force, this list, on this item, we are
5 accepting our role as having possession, custody, and
6 control, because we had federal officers involved.
7 And on other task forces or joint efforts, because of
8 the passage of time and whatever your relationship
9 with those law enforcement agencies are, you do not
10 have possession, custody, and control in the sense
11 that you can't pick up the phone and order that
12 state, local agency to provide documents to you. Did
13 I state it correctly?

14 MR. CASTLE: Yes, sir.

15 THE COURT: Can you live with that?

16 MR. BECK: And we will --

17 THE COURT: So we're not talking about
18 specific Giglio material. We're sort of just setting
19 the parameters here, so that we know what you got and
20 accepting responsibility for. They know what you've
21 got and accepting responsibility for. And then we'll
22 maybe fight over the consequences of that another
23 day.

24 All right. Live with that, Mr. Castle?

25 MR. CASTLE: Yes, sir.

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1 THE COURT: Live with that, Mr. Beck?

2 MR. BECK: Yes, Your Honor.

3 THE COURT: Anyone else? Ms. Sirignano?

4 MS. SIRIGNANO: Yes, Your Honor. I just
5 want to make sure the order covers all joined
6 defendants as well. We'll be providing our request
7 to Mr. Castle or to the Government independently.

8 THE COURT: And these rules of engagement
9 apply to everybody in the room, Mr. Beck?

10 MR. BECK: Yes, Your Honor.

11 THE COURT: All right. Does that do it for
12 you, Ms. Sirignano?

13 MS. SIRIGNANO: Yes, Your Honor.

14 THE COURT: All right. Anyone else?

15 All right. Next issue, Mr. Castle?

16 MR. CASTLE: These are not general
17 considerations. These are specific requests. I can
18 tell the Court that my review of the Government's
19 responses is they've agreed to -- either agreed to or
20 say that certain categories do not exist. So I'm
21 only going to address two areas that I believe we're
22 still asserting, other than the ones that they've
23 conceded.

24 THE COURT: All right.

25 MR. CASTLE: The first is competency or

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1 mental illness. The Government cited a case from
2 Judge Brack, which says that if they're aware of such
3 materials for their witnesses, they then have an
4 obligation to provide that. And they indicate that
5 for one defendant they're aware of such materials.
6 For that one defendant --

7 THE COURT: Do we know the defendant?

8 MR. CASTLE: Yes, Eugene Martinez.

9 THE COURT: And do we know where the
10 documents are located?

11 MR. CASTLE: No, because we have not been
12 provided them.

13 THE COURT: Okay. Let me ask you this: Is
14 this still you, Mr. Beck?

15 MR. BECK: I think in some ways it is, and
16 some ways it's not. I think Giglio area it is. I
17 think Eugene Martinez it's not.

18 THE COURT: Do you know where the documents
19 are? You must know some information about them.

20 MR. BECK: That's the portion that's not.
21 That's Mr. Castellano.

22 THE COURT: Okay. Mr. Castellano?

23 MR. CASTELLANO: Regarding Mr. Martinez, I
24 think our basic response for Eugene Martinez, is a
25 lot of documents are actually what we considered the

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1 Court's documents, because there was competency
2 evaluation. So a lot of those documents -- what we
3 had suggested was the Court conduct an in camera
4 review to see what the Court believed was Brady,
5 Giglio. And we agree there are probably materials in
6 those documents and in those materials which the
7 defense is entitled to.

8 The Court wrote a 69-page opinion which is
9 on the docket. I think it has probably just about
10 everything the defense needs. I mean, they can look
11 at that and see if they need more.

12 But we can't release the competency
13 evaluation to the defense. And so our position is
14 the Court has those documents. Those are the Court's
15 documents. And that was the Court's determination.
16 And so what we'd asked -- what was a review of those
17 documents. And then, what I would recommend with
18 regard to those documents is the Court -- and if the
19 Court wants counsel to chime in, the Court can make a
20 determination about what should or shouldn't be
21 disclosed from those documents.

22 And I would ask possibly that Eugene
23 Martinez' attorney have the opportunity to review
24 those to see if there is any objection that he may
25 have to the disclosure. But I think he will also

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1 agree that there are materials in there which the
2 defense is entitled to. And we don't dispute that.

3 THE COURT: Well, my memory is a little
4 fuzzy on exactly what the psychological reports said.
5 But I bet I can tell you what they say. There is
6 going to be a long list of documents that the
7 psychiatrist or psychologist reviewed at the
8 beginning of that report, right? And then they gave
9 me the report.

10 Here's the problem: Where do we want to
11 cut it off? Is what you really want is those two
12 reports? Because all that background stuff, I don't
13 have. And chances are -- wasn't it a Buttner -- it
14 was a Buttner review, wasn't it? We had a local
15 review, and then we had a Buttner review. It was
16 two-step, wasn't it?

17 MR. CASTELLANO: That's correct, Your
18 Honor. It was a facility in Los Angeles, rather than
19 Buttner. But basically --

20 THE COURT: Right, yeah, it was LA. Yeah.
21 Was it Terminal Island? Long Beach? It wasn't in a
22 federal facility. Was it at Metropolitan?

23 MR. CASTELLANO: It was Metropolitan
24 Detention Center. So your document is Doc 1118. The
25 Court has made findings of fact.

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1 THE COURT: And I've unsealed that?

2 MR. CASTELLANO: Yes. There is initially a
3 sealed document. You gave the parties an opportunity
4 to seek redaction as necessary. And then the Court
5 placed it on the docket. So if -- and the other
6 thing we were concerned about is whether or not the
7 defense is entitled to all of his records, or whether
8 what's more relevant are the facts from the records
9 that they need for purposes of impeachment.

10 THE COURT: Well, I'm sure Mr. Castle knows
11 this, and probably everybody in the room, but just so
12 we're on the same wavelength, when I get a report, I
13 don't typically get the backup information. I'm
14 going to get the report from the psychologist, local;
15 and then, when I get it from the BOP, it's going to
16 be a report. It's lengthy. That's the reason it
17 took a while to put that together because it's
18 lengthy, and there is a lot of information in there.
19 But I don't have the backups.

20 So the question is, are you comfortable,
21 if we can limit the universe to the two psychological
22 reports, then it seems to me -- if that's what you
23 want, then it seems to me, given that Ms. Milner
24 didn't ask for a lot of -- or any redaction, she may
25 not care whether I give you the two reports. We

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1 could put them in a confidentiality order. It can be
2 attorneys' eyes only, or something like that, to
3 protect Mr. Martinez' privacy as much as possible.
4 But it may be that we just contact her during the
5 lunch hour, and see if she'd have any problem with us
6 doing that.

7 Now, if you're wanting all the backup
8 stuff, it seems to me that, you know, certainly the
9 local expert is not going to be under the
10 Government's possession, custody, or control. And
11 I'm not even really sure that you could impute all
12 the medical records over at the BOP to the Government
13 because of HIPAA, and those sort of things. So you
14 might have to do a subpoena on those if you want to
15 get the hard records.

16 What are you thinking? Do you think those
17 two reports would be enough?

18 MR. CASTLE: I don't.

19 THE COURT: You don't?

20 MR. CASTLE: I'd like to agree, because it
21 makes it easy. But --

22 THE COURT: Would you agree with me that
23 probably the local psychologist that we used to do
24 the initial evaluation is not going to be in the
25 possession -- the Government's possession, custody,

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1 and control?

2 MR. CASTLE: Well, I don't know who hired
3 that individual.

4 THE COURT: Well, it was probably
5 technically me, in the sense that I get a CJA request
6 to hire, and probably I defer to Ms. Milner's
7 suggestion of who it was. And then I sent them out.

8 MR. CASTLE: Yeah, I believe that would be
9 a defense expert.

10 THE COURT: Okay.

11 MR. CASTLE: Whenever they waived, and
12 provided to the Court and to the prosecution, that
13 would be in the possession of the Government that
14 they would have to turn over.

15 THE COURT: So if we get Ms. Milner to
16 agree on the report, you'd have the name -- I'm
17 sorry, Mr. Couleur -- yeah, I'm getting my Martinezes
18 confused here. Get Mr. Couleur to agree, because he
19 didn't have any objections to the memorandum opinion,
20 if he would agree, you'd have that name. And then,
21 if you want to subpoena it, you could.

22 MR. CASTLE: Yes, Your Honor.

23 THE COURT: What about the BOP, though? It
24 seems to me a little bit hard to say the U.S.
25 Attorney's office has possession, custody, and

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1 control over Mr. Martinez' medical records at the
2 BOP.

3 MR. CASTLE: Well, I'm somewhat arguing in
4 a vacuum, because I don't know if the Government
5 requested the evaluation by BOP. And if they did,
6 then I believe it would be under their umbrella. But
7 it's the Government's obligation. And so we all know
8 that the materials that were sent there, there is no
9 confidentiality anymore because the defendant waived
10 it by providing them outside.

11 THE COURT: Well, but there is really no --
12 I don't know, when you say documents sent there, who
13 are you thinking of? Me or the Government or Mr.
14 Couleur?

15 MR. CASTLE: Normally, in the competency
16 evaluation, the parties will send to the evaluator
17 materials they think are relevant. My guess is Mr.
18 Couleur sent materials, because he was raising
19 competency, that supported a finding of incompetency.
20 The Government would have turned over some discovery:
21 I don't care about that, it's material we already
22 have; that they may have sent over, so the evaluator
23 can make some kind of an intelligent decision about.
24 What I'm basically talking about is materials that
25 Mr. Couleur sent over, likely. So at that point

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1 there is no waiver. It's in the possession of a
2 governmental agency.

3 I can tell the Court what the problem is
4 going to be, if the burden is on us, we're going to
5 have to file a subpoena. We're going to have to do a
6 Touhy letter. We're going to have to litigate this
7 out. We're going to bring in individuals. But why
8 are we doing all that, when frankly, there is no
9 privacy right anymore. He waived it. He raised
10 competency as something that he thought he needed to
11 do to try to protect himself and avoid answering the
12 charges here. But we believe that that is their
13 obligation.

14 THE COURT: Let me ask this, Mr.
15 Castellano, could everybody live with this? Rather
16 than requiring you to go get those materials, if what
17 we really need here is a court order, would everybody
18 agree to a stipulated court order? Are y'all not
19 opposed to a court order? And we put it on the BOP
20 to produce whatever it is. Because we know -- I
21 think we're all in agreement it's going to contain
22 some material. The question is who's -- if we have
23 to -- somebody has to go through that, it's going to
24 take a tremendous amount of time. What would you
25 think about that?

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1 MR. CASTELLANO: For the most part, I
2 agree, Your Honor. The problem is that I don't
3 believe Eugene Martinez waived all confidentiality.

4 THE COURT: Well, I'm not saying he does.
5 I think probably what we need to do is get hold of
6 Mr. Couleur and say, Would you be willing to just
7 stand down, not fight on this, allow the two reports
8 that the Court got to be given to the defendants, so
9 we can put it into some confidentiality order or
10 something like that. If he says no, then I agree
11 with you, we're probably back to a little bit square
12 one on this. But if we get Mr. Couleur to play a
13 little ball with us on this, and everybody just stand
14 down and issue an order to the BOP, and let's see
15 what we get, could you live with that?

16 MR. CASTELLANO: I think so, Your Honor.
17 And like I said, I agree there are materials in there
18 to which they're entitled. I just don't agree that
19 they're entitled to all of the materials. And I
20 think, if I remember correctly, there is a report
21 from MDC, and then the defense wanted its own expert
22 to evaluate --

23 THE COURT: I believe that it was Dr. Cave,
24 but I could be wrong on that.

25 MR. CASTELLANO: It might be in the

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1 memorandum opinion and order. But there is a second
2 opinion by the defense expert. Is it Dr. Westfried?

3 THE COURT: Is that the first one?

4 MR. CASTELLANO: Dr. Westfried was the
5 defense expert. And so that was -- Dr. Johnson
6 was --

7 THE COURT: The first time?

8 MR. CASTELLANO: Dr. Johnson was from MDC,
9 and Dr. Westfried was the defense expert.

10 THE COURT: So there were two
11 psychologists?

12 MR. CASTELLANO: Yes, I believe that's
13 correct.

14 THE COURT: Yeah, okay. Well, since I used
15 those so extensively in the opinion, it may not be
16 that Mr. Couleur cares about those. We can get those
17 rather quickly in the defendants' hands.

18 Stopping right there, would that be okay
19 with you?

20 MR. CASTELLANO: What I would ask is that
21 Mr. Couleur be given a chance to review the materials
22 and make objections.

23 THE COURT: Okay.

24 MR. CASTELLANO: Because I know there are
25 materials he probably won't want to disclose, they're

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1 probably embarrassing to his client and not relevant.

2 THE COURT: All right. And then I can take
3 a look at those redactions and see if I think there
4 is any Brady or Giglio, Rule 16 material, and then go
5 from there.

6 MR. CASTELLANO: Yes, sir. We would be
7 fine with that procedure.

8 THE COURT: And then could you live, then,
9 with the -- if the defendants want to pursue these
10 documents, we do it the same way; that they come
11 maybe to the courthouse, Mr. Couleur look through
12 them before they're turned over to the defendants?

13 MR. CASTELLANO: Yes.

14 THE COURT: Okay. Mr. Castle, what I
15 suggest is maybe some of y'all on the team call Mr.
16 Couleur -- and let's maybe even while we're here in
17 Las Cruces, see if we can get hold of him, see if he
18 can live with that. If he can't live with it, then
19 we'll be down here, and we can talk about the next
20 options. Could you live with that?

21 MR. CASTLE: That sounds fine, Your Honor.

22 THE COURT: All right. Anybody have a
23 problem with that? All right. So that's tentative.
24 We'll see what Mr. Couleur says. If he plays ball,
25 then that will solve that problem. If he won't, then

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1 we'll regroup sometime while we're down here.

2 MR. CASTLE: And at that time we'll also
3 discuss the underlying facts that might have been
4 shipped off to Buttner; is that right?

5 THE COURT: Well, I'm assuming -- if
6 Mr. Couleur will give you what he shipped.

7 MR. CASTLE: Yes, then that would be fine.

8 THE COURT: That would solve problems. And
9 tell him we can probably work with attorneys' eyes
10 only, we can do confidentiality, things like that.
11 But I'm assuming that if he doesn't say that, then we
12 get a court order, and then, you know, we'll have to
13 deal with Buttner and see if they'll just produce it.
14 And he may want that for his protection, too. I
15 don't know.

16 MR. CASTELLANO: And I'm fairly certain the
17 materials we would have sent would have been the
18 discovery materials. I will double check that. I
19 expect any other confidential materials would have
20 come from Mr. Couleur.

21 THE COURT: Well, educate me a little bit.
22 Sometimes on those competency, do y'all send
23 materials out to the BOP?

24 MR. CASTELLANO: Yes. From time to time,
25 Your Honor, what they'll ask is for basic reports

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1 regarding the incident, so they can ask the person
2 being subjected to testing. So they will ask for
3 copies of the indictment and copies of the discovery.
4 And we send those over.

5 THE COURT: Okay. Well, I didn't know
6 that, so that's good to know.

7 All right. Anything else on that issue?

8 MR. CASTLE: Yes, Your Honor. The
9 Government said they were only aware of two different
10 individuals --

11 THE COURT: Let's do this, if we're going
12 to have a couple more individuals, why don't we take
13 them up after lunch. Would that work for you?

14 MR. CASTLE: Okay. And I'll share that
15 with the Government again and see if it resolves some
16 of those.

17 THE COURT: Okay. All right. Let's shoot
18 for about an hour. I'm going to leave the building.
19 I'm going to take a walk. So let's shoot for an
20 hour. Nobody is going to start without anybody. But
21 let's shoot for being back here about 1:30. All
22 right. See you then.

23 (The lunch recess was held.)

24 THE COURT: Las Cruces has a new barbecue
25 place across the street there. I guess we don't need

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1 to all show up at one time, but I recommend it. I
2 think Mr. Jewkes tried it, so you can ask his
3 thoughts on it.

4 All right. Mr. Castle, if you want to
5 resume -- and I think where we were is you were going
6 to bring up a couple more folks that we needed to
7 think about the medical records on.

8 Hold on just a second.

9 MR. LOWRY: Judge, can I take up one quick
10 housekeeping matter?

11 THE COURT: Is that all right, Mr. Castle?

12 MR. CASTLE: Sure.

13 THE COURT: All right. Go ahead, Mr.
14 Lowry.

15 MR. LOWRY: Your Honor, I don't want to
16 belabor this.

17 At the very beginning of this case, Your
18 Honor had instructed and frankly admonished the
19 defendants about their behavior in the courtroom.
20 And there seemed to be, over the course of the
21 proceedings, some type of agreement that as long as
22 their courtroom behavior was top-notch, that over
23 time the courtroom security issues perhaps could get
24 more relaxed. And I couldn't help but notice this
25 morning everybody is back in the black boxes. And I

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1 was wondering if the Court could address this. And
2 so if there is anything we can talk about --

3 THE COURT: Yeah. Yeah, the guys are
4 misbehaving.

5 MR. LOWRY: Okay.

6 THE COURT: You know, I told you, I said,
7 if you want to -- we'll work with you. But you're
8 misbehaving.

9 MR. LOWRY: Is there anything in
10 particular?

11 THE COURT: Don't bring stuff to the
12 courthouse. Talk to your clients. Don't bring stuff
13 to the courthouse.

14 MR. LOWRY: Okay.

15 THE COURT: Okay. You tell them. You tell
16 them not to do that.

17 MR. LOWRY: I believe you, Your Honor. And
18 I've talked to the marshals.

19 THE COURT: I'm talking to contraband.

20 MR. LOWRY: Your Honor, I agree. I've
21 talked to them, and as far as I know my client --

22 THE COURT: Don't bring stuff here.

23 MR. LOWRY: Okay.

24 THE COURT: Now, if I can get an assurance
25 people are going to behave and not bring contraband

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1 to the courthouse, we'll talk about it. But we're
2 going to go back to the old days if they're going to
3 misbehave.

4 MR. LOWRY: Understood. Are we talking
5 drugs?

6 THE COURT: Shanks. Razor blades. Don't
7 bring them to the courthouse.

8 MR. LOWRY: Understood.

9 THE COURT: Not here; not in Albuquerque.

10 MR. LOWRY: Nowhere. No.

11 THE COURT: And the reason is, you know,
12 I'm okay. People are going to protect me, they're
13 going to protect the staff. I'm worried about you
14 guys in the room. I'm worried about your clients.

15 MR. LOWRY: Understood.

16 THE COURT: We know what's going on here.
17 And I don't want anybody hurt. So I'm watching out
18 for you guys, you know. I know some of you are
19 the -- you know, there is the huntees and the
20 hunters, I know that. But we don't need that. We
21 don't need that in a federal courthouse. We want
22 everybody to be safe. So when you come to the
23 courthouse, we want everybody to be safe.

24 MR. LOWRY: I appreciate that.

25 THE COURT: So you talk to them. Everybody

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1 talk to their client. If we can make it a little
2 more comfortable, I'd love to do it. But right now,
3 I'm feeling that -- like we got some folks here that
4 are in danger.

5 MR. LOWRY: Okay.

6 THE COURT: So let's work together. And
7 we'll try to work together.

8 MR. LOWRY: Okay, Your Honor. Thanks.

9 THE COURT: All right.

10 MS. JACKS: May I just ask a question, Your
11 Honor?

12 THE COURT: Sure. I may not answer it, but
13 you can ask it. You remember that old rule? Don't
14 ever ask a judge a question because it embarrasses
15 him or her.

16 MS. JACKS: If you're able to say, was
17 there something brought to the courthouse today,
18 or --

19 THE COURT: I don't know about today. I
20 don't know about today.

21 MS. JACKS: Okay, thank you.

22 THE COURT: But it's happened.

23 Mr. Blackburn, are you going to ask me
24 another question?

25 MR. BLACKBURN: Sure. If you'll answer it.

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1 THE COURT: I answered that one, didn't I?

2 MR. BLACKBURN: Yeah, can you out the team
3 that's doing that so we can come talk to you?

4 THE COURT: No, I probably can't do that.

5 MR. BLACKBURN: I mean, because as you say,
6 there is the hunters and the huntees.

7 THE COURT: Yeah.

8 MR. BLACKBURN: You know, and that's not
9 fair to all of us. It's one sweeping agenda.

10 THE COURT: Well, you know, I can't keep
11 track of everything.

12 MR. BLACKBURN: I understand.

13 THE COURT: And to be honest, I probably
14 couldn't tell you the names. If I sat here for a few
15 minutes -- I can remember one, I can remember one.
16 But I can't remember them all. So why don't you talk
17 to the Government, why don't you talk to the
18 marshals. If that helps you --

19 MR. BLACKBURN: I mean, most definitely we
20 will do that, because if there is a problem, I think
21 it's because of -- it's for all of us to address
22 because it's affecting all of us. So if there is one
23 person, I would like to out them.

24 THE COURT: Well, I think I've demonstrated
25 that we worked with you when everybody is behaving.

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1 Now, I don't know if it's because we're getting
2 closer to trial or what, but we've got to get back to
3 that, if we're going to make it work.

4 MR. BLACKBURN: Okay. Well, I'll talk --

5 THE COURT: I don't like people being
6 uncomfortable just to be uncomfortable. That's not
7 my --

8 MR. BLACKBURN: Well, we were speaking
9 about this, like, this morning they brought my client
10 by himself, when everybody else comes together from
11 Otero, which makes it look like that he has been
12 outed doing something that -- maybe he's talking to
13 somebody or something, and that causes issues itself.

14 THE COURT: I don't minimize the problem.
15 And I fully understand what you're saying. But
16 that's below the level I get involved in.

17 MR. BLACKBURN: Okay.

18 THE COURT: So you'll have to talk to the
19 U.S. attorneys and marshals about that. Because I
20 just can't micromanage everybody getting here.

21 MR. BLACKBURN: No, I understand. And if
22 they are not willing to talk to us, do we get to come
23 back and talk to you?

24 THE COURT: You can come back. The
25 courthouse door is never closed, especially to you,

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1 Mr. Blackburn.

2 MR. BLACKBURN: Thank you, Judge.

3 MR. CASTLE: Will you remember that?

4 MR. BLACKBURN: I won't forget it.

5 THE COURT: You won't forget it.

6 Let's see, Ms. Fox-Young, are you on the
7 phone?

8 MS. FOX-YOUNG: I am, Your Honor.

9 THE COURT: And let's see, Mr. Adams, are
10 you on the phone? Mr. Adams?

11 MR. ADAMS: I am, Your Honor.

12 THE COURT: All right. Good afternoon to
13 you.

14 Mr. Castle.

15 MR. CASTLE: Your Honor, over the break, we
16 resolved a couple of things, or at least agreed to
17 shelve some of them. There were two other
18 individuals that we believed there was evidence in
19 the discovery that indicated they had mental health
20 issues other than Mr. Martinez.

21 I can tell the Court with regard to Mr.
22 Martinez -- we've contacted his attorney -- his
23 attorney is going to discuss things with Mr. Martinez
24 and get back to us, and we'll inform the Court.

25 THE COURT: Did he give you any sort of

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1 time frame? Is that something we can wrap up down
2 here? Mr. Cooper?

3 MR. COOPER: His client is in Lovington,
4 he's in Santa Fe. He asked if there was a time
5 crunch. I said, Absolutely there is. And he said,
6 Let me see what I can do. But beyond that, I don't
7 have any --

8 THE COURT: What's he doing in Lovington?

9 MR. COOPER: I don't know.

10 THE COURT: At the Hobbs facility, okay.

11 All right. Thank you, Mr. Cooper.

12 MR. COOPER: Thank you.

13 THE COURT: Mr. Castle.

14 MR. CASTLE: There is another individual,
15 Leonard Lujan, the Court has heard about. The
16 discovery indicates that he was on all kinds of
17 medicines for antipsychotic, bipolar medicines,
18 things like that. The Government is going to contact
19 his lawyer, Mr. Clark -- who was here earlier, but
20 he's not here now -- and we're going to try to see
21 what we can resolve before we use the Court for any
22 assistance.

23 THE COURT: Okay.

24 MS. ARMIJO: Mr. Clark will be here at
25 3:15.

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1 THE COURT: Okay.

2 MS. ARMIJO: Maybe if there is a break or
3 something, you can meet with him.

4 MR. CASTLE: Then the third individual
5 is --

6 THE COURT: If we come back to this, y'all
7 may need to refresh my memory on Lujan.

8 MR. CASTLE: I will.

9 And the third individual is an individual
10 by the name of Jimmy Ray Gordon. The Government
11 indicates they're not going to call him as a witness
12 so I don't believe they have an obligation under
13 Giglio, unless of course his statements are going to
14 come in. But I don't believe they're offering that.

15 With that, there was one other general
16 issue -- oh, actually there are two other matters.
17 One is we'd asked for prior placement records. I
18 think we've come to an agreement on that. Now, what
19 our concern was, they indicate that three individuals
20 other than Mr. Lujan, who they said participated in
21 the crime with our client, but three individuals who
22 say: On some unknown date in the last 15 years was
23 housed with our client, and our client confessed to
24 them his involvement. They can't identify the dates
25 that happened. And so they're going to give us the

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1 placement records for those individuals, so we can
2 compare them to our client's placement records to see
3 if it's even possible that that conversation
4 happened. And so I don't think there needs to be any
5 court orders in that regard, because they're agreeing
6 to that.

7 The other issue I looked at over the lunch
8 hour was, when we had asked for Giglio materials, we
9 asked for evidence of illegal drug use of their
10 witnesses. The Government did not respond to that.
11 I'm not sure they disagree with that. But before I
12 make argument about that, perhaps the Court can
13 inquire.

14 THE COURT: All right. So this is probably
15 going to be -- let me see if I can state what the
16 request is -- that if the Government knows or has
17 some document or some witness, 302, something like
18 that, that indicates that the witness has used drugs
19 in the past, you'd like some ruling on that whether
20 it's going to be a Giglio?

21 MR. CASTLE: Yes, Your Honor. They've done
22 some of that, for example, in the crime base that
23 we're dealing with, in 2001 --

24 THE COURT: You're just trying to confirm
25 across the board they're treating illegal drug use as

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1 a Giglio issue?

2 MR. CASTLE: Right, because a lot of them
3 were using heroin at the time they were apparently
4 observing things.

5 THE COURT: Mr. Beck, is that what you're
6 doing?

7 MR. BECK: Yeah. I think to the extent
8 that the Government knows about that, it would be in
9 the defendants' disciplinary reports, which have been
10 produced and will be produced in the next disclosure.

11 THE COURT: But as far as -- when you're
12 doing your Giglio and Brady review, you're treating
13 illegal drug use as a Giglio issue?

14 MR. BECK: Yes.

15 THE COURT: Okay. Is that all you need on
16 that?

17 MR. CASTLE: That's all I need on that,
18 Your Honor.

19 THE COURT: Anybody else? Resolve that?

20 All right. Mr. Castle.

21 MR. CASTLE: The final issue is one that's
22 probably the most concerning for us is timing. When
23 we filed our motion, the Giglio motion, it was filed
24 in May of 2017. And the Government's response, they
25 filed it on June 7, 2017. And in that response they

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1 indicated that they would, quote -- well, "disclose,"
2 quote, "impeachment evidence immediately." They
3 haven't. What we've gotten on all the people that we
4 know are going to be witnesses is their criminal
5 history and their plea agreements, with some minor
6 exceptions. We haven't gotten Giglio material. And
7 their most recent responses to the motion to compel
8 said they're not going to give us that until they
9 finally decide on witnesses two weeks prior to trial.

10 Now, the irony in that is earlier this
11 morning the Government moved to remove an attorney in
12 the case because they said that Arturo -- not Arturo,
13 but --

14 THE COURT: Martinez.

15 MR. CASTLE: Roy Paul Martinez was going to
16 be a witness in the case. So they were going to the
17 extreme length to try and remove an attorney for one
18 of the defendants here, yet they haven't turned over
19 Giglio material concerning Mr. Martinez.

20 I'm using that as an example to tell the
21 Court that, look, they've made some decisions. And
22 I'd be shocked if they hadn't. They were within two
23 or three weeks of trial last summer. And to say that
24 they haven't made any decisions on what witnesses
25 they're going to call, I think is disingenuous.

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1 Sure, there are couple. I mean, maybe the answer is
2 that's the tenth person that might confirm something,
3 and they have marginal use. But for most of our
4 clients, we can identify who the chief witnesses of
5 the Government are.

6 THE COURT: Well, let me -- and, you know,
7 the Government can speak for itself on this issue --
8 but is the somewhat dwindling number a factor in
9 probably the Government deciding who they're going to
10 call and not call at trial?

11 MR. CASTLE: I think it isn't. Because
12 they --

13 THE COURT: Is not?

14 MR. CASTLE: Is not. Because they've
15 retained defendants on almost every crime base.

16 THE COURT: They've done what?

17 MR. CASTLE: They've retained at least some
18 defendants on each crime base. I can't say with
19 100%, but I know that counsel one and two, for
20 example, have a number of defendants.

21 THE COURT: Well, give me the solution.

22 What do you see the solution as being?

23 MR. CASTLE: Well, I think the Court had
24 already provided a solution, which indicated that the
25 prosecution was to review its files and produce

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1 Giglio materials by June 9 to --

2 THE COURT: Well, they disagreed with that
3 ruling, but they also are living by it. And I mean,
4 they disagree that the timing on Giglio material is
5 the same as Brady material, but they acknowledge that
6 that's my ruling, and they'll live with it. But tell
7 me from a practical standpoint how we now sort of
8 implement that to get you what you need?

9 MR. CASTLE: Well, Your Honor, with all due
10 respect, I think they told the Court in their
11 responses that they're not going to live with it.
12 They're not going to do it until two weeks prior to
13 trial, even though the Court ordered it previously.

14 So we're here at an impasse. And what I
15 suggest is anything that's in their possession right
16 now that they haven't turned over needs to be turned
17 over within a week. There is no reason to hold it
18 back, other than a strategic tool to try to put
19 defense at a disadvantage. That wasn't the design of
20 Jencks, for example. And this Court already
21 indicated Giglio and Brady trump Jencks. So I would
22 say that within a week they should produce that
23 material. And then within a reasonable period --

24 THE COURT: Well, I'm treating Brady and
25 the Giglio differently than I'm treating Jencks.

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1 MR. CASTLE: Yes. Brady-Giglio --

2 THE COURT: I won't say "trump," but we're
3 not going to talk about Trump. We're not going to
4 talk about Trump, we're going to talk about the law
5 here, right? But they run alongside each other,
6 right?

7 (Defendant Christopher Chavez entered the
8 courtroom.)

9 THE COURT: Mr. Christopher Chavez just
10 walked into the courtroom. Mr. Chavez, good
11 afternoon to you. We missed you.

12 THE DEFENDANT: Good afternoon.

13 THE COURT: All right. And your attorneys
14 said it was all right to proceed without you. We
15 tried to take some motions that didn't involve you.
16 That's okay?

17 THE DEFENDANT: That's fine.

18 THE COURT: All right. Good to see you.
19 Glad you're here.

20 THE DEFENDANT: Good to see you.

21 MR. CASTLE: I won't say trump, but I would
22 say there is a huge difference, following along with
23 humor.

24 THE COURT: Okay. I got it.

25 MR. CASTLE: So what do we do now when the

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1 Court has already ordered it and they haven't
2 produced it? One of the defendants, I believe --
3 well, maybe with one exception -- didn't ask for
4 sanctions. We asked to come back here and let's give
5 it another try, to try to get them to get the
6 materials to us. So what I am suggesting is
7 everything they've already collected within a week,
8 and two weeks to collect the remaining, with
9 obviously an option that they in good faith, and
10 still haven't been able to obtain it, they could
11 indicate so.

12 I would ask for a certificate of
13 compliance, because the history of this case -- and
14 it's unfortunate, I don't want to cast aspersions --
15 but the history of this case is this Court has
16 ordered production of things, and they don't get
17 produced many times, when they have been ordered to
18 have been produced. We've had motions to compel on
19 the table that clearly set forth that the Court
20 ordered this back in June, and those motions to
21 compel have been standing here for a month or two,
22 and still we don't have it.

23 And so, you know, I don't think -- and I'm
24 not counting on the Court, if I violate the orders of
25 the Court that the Court is going to look very fondly

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1 on that, and I'm sure I'll pay a sanction. I'm not
2 asking for a sanction. I don't believe almost all
3 the defendants are. We're just asking for
4 production. And I think they do need to indicate
5 that they've complied, and give us a timeframe. If
6 they want it outside two weeks, they need to tell us.
7 So I cannot reiterate enough that their plan was two
8 weeks prior to trial. That's going to be
9 insufficient for us to make real use of it. I mean,
10 there are materials where we need to follow up, find
11 witnesses, some of the witnesses might be Government
12 witnesses, where you have to file a Touhy affidavit.
13 It's a huge burden.

14 The bottom line is this has been litigated.
15 The law of the case is they were supposed to produce
16 it. They haven't. So now we're here.

17 And I believe some other defendants want to
18 address this issue, because I think it underlies all
19 the motions to compel. But I don't know what else to
20 tell the Court.

21 THE COURT: Well, I don't want to cut
22 anybody off. But why don't I hear -- let me talk to
23 the Government a little bit, and then I'll hear from
24 other people. But let me sort of hear what the
25 Government is thinking on this. Mr. Beck?

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1 MR. BECK: So I think -- I mean, I think
2 there is some misunderstandings here. And it's
3 probably everyone's fault. In terms of Giglio
4 information, we understand the Court's ruling. And
5 as the Court said, we don't agree with it, but we're
6 abiding by it. There has been numerous productions
7 of jail calls, disciplinary history, classification
8 records, pen packs, STIU files, jail calls. There
9 has been numerous productions, and those are still
10 ongoing.

11 I mean, the jail calls alone for Eric Duran
12 I believe so far are at 5.6 gigabytes. And those are
13 coming out. So that production is huge.

14 I think what the defendants are really
15 latching onto here is, like, the payments to these
16 cooperating defendants, and these haven't been turned
17 over.

18 And as Court acknowledged, our trial
19 strategy is different today than it was in June, in
20 terms of who we're anticipating we'll call as
21 witnesses. Some cooperating defendants who we
22 intended to call as witnesses are not looking so
23 appealing to call as witnesses after a few incidents
24 that we've discussed here in court. Some others who
25 have recently made the decision to come onboard are

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1 looking more appealing. So that is in flux. And
2 until -- I think the United States' position is that
3 until we decide who we're going to call as witnesses,
4 certain information is not Giglio. So I think we've
5 been consistent on that.

6 In terms of payments, we take the same
7 position. But that being said, we're just going to
8 turn it over to what we paid these co-defendants,
9 because people know that they were here sitting with
10 them months ago, and now they're not. So we're not
11 protecting their identities. And in the interest of
12 just being done with these arguments, we're turning
13 that stuff over. We're not conceding that it's
14 Jencks or Brady because we don't know whether we're
15 going to call these people. But as I said, I think
16 that's what the thrust of the case is that we haven't
17 turned over these payments or cooperator agreements,
18 which don't exist. You know, things like that.

19 So I think there is a fundamental
20 misunderstanding of information that we have,
21 information that falls under Giglio, in terms of our
22 current posture for this case, and what we've turned
23 over.

24 So I hope I've answered the Court's
25 question, that some of this stuff is lengthy in terms

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1 of -- Eric Duran, for example, we've been talking a
2 lot about him. We don't know that we're going to
3 call him at this point. We may. That being said, as
4 I said, his jail calls alone are 5.6 gigabytes. We
5 turned over his disciplinary report, 277 pages. His
6 classification records, 330 pages.

7 This next round of discovery coming from
8 the discovery coordinator will have 122 pages of his
9 visitation records, his pen pack, his STIU file, a
10 phone dump from his cellphones. So that we're not --
11 I just want everyone in this room to be aware that we
12 understand the Court's order; that we're abiding by
13 it.

14 And I think their view of our trial
15 strategy is different than ours. And it is in flux
16 to some extent.

17 So I don't know if the Court has any more
18 questions.

19 THE COURT: Well, I want to hear from
20 everybody. But let me begin to work with an idea.
21 Y'all may all shoot it down, but let's see if there
22 is something here we can work with.

23 Normally, I wouldn't start getting witness
24 lists until the pretrial conference. And I don't
25 know when the pretrial conference is set here -- it's

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1 not been set. But what if I just set a deadline for
2 witness lists. And the witness list that the
3 Government gives to the defendants is the one that
4 the Giglio responsibilities are immediate. And that
5 will -- I'm not saying it's due today, but we set a
6 time -- because at some point, we're going to have to
7 have a witness list -- let's set it. Leave
8 everything else for the pretrial conference, but set
9 it. And then that would give those people you're
10 responsible for the production of Giglio and Brady
11 material -- people not on the list -- and it will
12 force you to sort of maybe front-end load this
13 discussion some. And you can be generous. But you
14 know that if you keep them on the list, you're going
15 to be responsible for it.

16 How would the Government react to that?

17 MR. BECK: I have two thoughts on that.
18 The first is that we have a witness list disclosure
19 deadline in the current scheduling order by the
20 Court.

21 THE COURT: When is it?

22 MR. BECK: January 19 is when the witness
23 lists are due.

24 THE COURT: Well, what if we moved it up
25 some. And you can revise it --

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1 MR. BECK: Right, understood.

2 THE COURT: You can revise it to knock some
3 people off. But it's going to put a little bit of
4 teeth into my ruling that the Giglio material is due
5 immediately.

6 MR. BECK: Right. So I think it's January
7 12, which I believe is 17 days before trial, it
8 sounds like; 17 days, a little more than two weeks.
9 And again, I'm thinking that -- I think that's fine,
10 and I understand the Court's position. I think the
11 defendants are primarily concerned with cooperators
12 testimony. And I think that, with the information
13 that I just described to the Court, that we're
14 turning over -- that we have turned over in the
15 past -- excuse me, and that we're turning over now,
16 including payments to cooperators --

17 THE COURT: If I just left you alone, when
18 do you think you'd have all that material to the
19 defendants?

20 MR. BECK: I mean, honestly, I'll listen to
21 my co-counsel here, but I think they're largely
22 getting all of it now, aside from Jencks statements.
23 The Court separated Jencks. And I mean Jencks
24 statements in the Court's -- what I think is proper
25 under the law view of Jencks statements, which means

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1 that we've taken a broad, inclusive approach to
2 Giglio and Brady in this case, looking at what we may
3 have at one point considered Jencks statements in the
4 context of statements that these now cooperating
5 defendants have provided to law enforcement in the
6 past, that may be inconsistent with what they
7 provided to the United States in proffer statements
8 or debrief statements that we may have otherwise held
9 back as Jencks.

10 So I think largely -- I think it would be
11 much ado about nothing if we do impose this new
12 witness list deadline.

13 THE COURT: Well, if you are saying that if
14 you haven't turned over -- and I'll give it a big
15 category, the compensation or the payments to the
16 cooperators, if that's sort of the last big bundle of
17 stuff that hasn't been turned over, what would be
18 your deadline, if I left you alone, to getting that
19 into the defendants' hands? If you're guessing right
20 this is what this is all about, when do you think you
21 could have that bundle of discovery into the
22 defendants' --

23 MR. BECK: As I said earlier, we are
24 turning that over in this next round of discovery.
25 We don't agree that it's Jencks, but we'd rather just

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1 get it out there to stop arguing about it.

2 THE COURT: When is that going to be turned
3 over?

4 MR. BECK: I assume it will probably go to
5 the discovery coordinator in two weeks. And I don't
6 know the dissemination on the tablets, but I think
7 it's rather quick.

8 THE COURT: Well, then -- and this is what
9 I was thinking when I was saying moving up the
10 list -- we're not very far apart -- I was thinking
11 about the end of business on the 22nd, which is that
12 week is when I'm going to be back down here. So that
13 will give you a couple of weeks, solidify your
14 witness lists, get whatever is out there. If you do
15 it in advance, we can use a little bit of that time
16 when I'm down here to talk about where we are. And
17 if not, if it is by the end of business on that
18 Wednesday, we'll kick it back in when I'm back down
19 here the first week of December.

20 MR. BECK: The only --

21 THE COURT: Tell me what you see is the
22 problems from the Government's standpoint if I do
23 that. That would formalize it rather than -- what I
24 think the defendants are concerned about is, if I
25 don't put some deadlines on this thing, they're just

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1 never going to get it. So that would formalize it,
2 but it sounds like it's about on your schedule
3 anyway.

4 MR. BECK: Right. I understand the Court's
5 position with that. So there are two different sort
6 of trial dates in this. So if the Court is inclined
7 to do that, I guess that would be about two months
8 before the trial.

9 THE COURT: Pretty close.

10 MR. BECK: If the Court's anticipating
11 setting that deadline, we would ask that there be two
12 different deadlines for the two different trials. So
13 the April trial, then, would be moved out two months
14 for that witness list.

15 The second thing I would ask the Court is
16 that I can't think of anybody offhand, but there may
17 be a situation in which -- there may be a situation
18 in which we anticipate a Government informant
19 testifying who may not be outted, who may not -- and,
20 as I said, I can't think of anyone, so there may be
21 some name or names that we would need to provide to
22 defense counsel, attorneys' eyes only at this point.
23 As I said, I can't think of anyone. But if the
24 defense would agree to that, then I think maybe we
25 could come to an agreement that the Court's deadline

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1 for the witness list.

2 THE COURT: Okay. The rough framework is
3 doable then?

4 MR. BECK: And since this is with the
5 understanding that it would be something that we
6 could amend in the future, we'd ask that if the Court
7 imposes this deadline it's agreed to, that it be
8 mutual.

9 THE COURT: I would look favorably upon
10 deletions. I would look a little bit more askance at
11 additions, given what we're trying to do here.

12 MR. BECK: Understood.

13 THE COURT: Okay. Thank you, Mr. Beck.

14 Mr. Castle. Let me have you back up here.
15 I know other people want to talk. But I want to talk
16 to you a little bit and see if there is a framework
17 here that we can maybe work with, put in place. What
18 do you think?

19 MR. CASTLE: Well, I think the defense
20 needs it sooner than that. I mean, that's why we
21 asked for it last year.

22 THE COURT: Well, it sounds like you're
23 largely going to get it sooner. I mean, you're going
24 to get this document production pretty quickly. But
25 I'm putting in some deadlines now that it can't go

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1 beyond that.

2 MR. CASTLE: The reason I have hesitancy,
3 Your Honor, is the Government has disclosed to us,
4 against Mr. Billy Garcia, the identities of five
5 people, essentially, that can provide evidence
6 against him.

7 Now, they told the Court just now that
8 they've given massive amounts on the major witnesses.
9 For all but one of those witnesses we haven't
10 received any of the categories of evidence that they
11 said they've already given us; phone calls, STIU
12 files, the criminal history, any of that, for all but
13 one. We have it for Mr. Lujan. That's it.

14 So normally -- it's fine if we agree and we
15 can rely upon their assurances that they will
16 produce. But they've now given assurances that
17 they've produced things that they haven't produced.
18 So I'm concerned about that. And that's why I think
19 we should build in more time so that when we get
20 this, and we look and see we didn't get everything,
21 we have some time to be able to come back to the
22 Court and litigate it. I think 30 days prior to
23 trial, unfortunately there is going to be a lot of
24 litigation. I know the Court has indicated, for
25 example, that with regards to statements issues that

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1 that's going to be the subject of more targeted
2 litigation once we know statements are going to be
3 issued. There is going to be other matters that
4 everyone needs to be doing in that last 30 days.

5 So I can understand why the Court is going
6 the direction it's going. But I can tell the Court
7 that they haven't been complying so far. As a
8 defense attorney and the history of this case, I'm
9 not willing to rely on their assurances at this
10 point. It's a sad statement to say.

11 But I mean, they're relying, for example,
12 on a man by the name of Ray Molina. I've gotten two
13 statements from -- Mr. Molina statements. That's it.
14 Not a criminal history. Nothing.

15 On September 13th of this year -- I tried
16 do this informally first -- on September 13th of this
17 year, I asked for Mr. Lujan's and Frederico Munoz'
18 phone calls while they were in the Bureau of Prisons.
19 Nothing so far at all, at all. I don't know, maybe
20 that's the next up. But that's been the problem.

21 And I know the Court is probably tired of
22 hearing lawyers complain about discovery. I can
23 imagine. But this case is almost two years old.
24 They've had plenty of time to collect all this
25 information. And so the only reason to delay any of

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1 it is to try to get a tactical advantage. And I
2 don't think that is the purpose of any of these rules
3 that we're relying on, either the Jencks Act, the
4 statute, is to give them a tactical advantage. The
5 advantage that the Jencks acts talks about is to
6 protect witnesses. We know these witnesses. We know
7 the identities of every one of them. So to withhold
8 their Giglio material is not to protect these
9 individuals. A protective order would take care of
10 that. It is to prejudice the defendants and their
11 preparation for the case. I want to make no mistake.
12 That's the goal.

13 And we're enlisting the Court's help in any
14 way it feels comfortable to help us so that we could
15 have a fair trial in that regard.

16 And we're not talking an ordinary case.
17 We're talking cases which my client not only has to
18 defend against the people who say he may have
19 confessed some unknown date in the past, he's got to
20 defend against the entire VICAR criminal enterprise.
21 You know, we may not choose to at some point, but
22 we're required to at least review that, and then
23 defend against it. So we're not just talking about
24 five people that may be relevant to my client. It's
25 really all their witnesses are relevant to my client.

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1 And so that's the problem we're here for.
2 And I haven't yet once heard them say why, why delay
3 is necessary, other than perhaps maybe we haven't
4 decided our final witness list. But I don't think
5 the Court is concerned with that. But I think the
6 real reason is: Let's hold it back so we can get an
7 advantage and the defense can't use it in time, to
8 effectively use it at trial. And I don't think
9 that's a proper purpose.

10 THE COURT: Mr. Beck, if I move this back
11 to the Friday before, say 5:00 on the 17th, and then
12 you get your documents out that you indicated that
13 you were going to produce in two weeks, you get it
14 out by the end of business on the 17th, so then we've
15 got those three days when I'm back down here to start
16 taking up problems, could you live with the end of
17 business on the 17th?

18 MR. BECK: Are you asking about the witness
19 list or the production, or both?

20 THE COURT: Yeah, instead of you delaying
21 your production till two full weeks, have it done by
22 the 17th. And then you also give the witness list by
23 the end of business on the 17th, so then we can use
24 some of the next week to discuss and see where we
25 are.

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1 MR. BECK: So to answer Your Honor's
2 question, I think we can do that.

3 I want to note that I take extreme issue,
4 as I have the whole time in this case with what
5 they're classifying Giglio, in terms of phone calls,
6 and pen pack information. I mean, this is stuff that
7 we've agreed to turn over to them without conceding
8 that there is impeachment materials. And if they
9 search through these 5.6 gigabytes and find something
10 they want to impeach someone with, I wouldn't be
11 surprised. But I'm just saying that I take issue
12 with them saying we're delaying this for tactical
13 reasons, when there is 5.6 gigabytes of information
14 that are not in the United States' possession. It's
15 not like when someone makes a phone call, we're
16 sitting on the other end with a recording device
17 waiting to hand it over to someone and use it in our
18 back pocket.

19 So I understand Mr. Castle's position. I
20 understand his frustration. The United States is
21 frustrated that we have to get this stuff, too. And
22 we know it's our burden to do so in some cases. But
23 I take issue with that.

24 So, yes, to get back to your position, I'm
25 out of town next week, so it won't be my burden to

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1 get it out, so I'm saying yes, we can, because I
2 don't have to deal with it.

3 THE COURT: Nothing like throwing
4 co-counsel under the bus, is there?

5 MR. BECK: No, it's the people who are much
6 more important on that stuff than my co-counsel.

7 THE COURT: All right. Mr. Castellano.

8 MR. CASTELLANO: Your Honor, as Mr. Beck
9 alluded to, there are two trial dates that we're
10 dealing with currently. One is January 2 and April.
11 So one point is whether or not, in order to expedite
12 the disclosures we can have a deadline for the
13 January trial, which is what the Court is asking,
14 which is November 17, and a second deadline for the
15 April trial, otherwise -- then we have five
16 defendants in January, and I believe nine defendants
17 currently set for April.

18 And the other question is reciprocal. So
19 once the witness lists and things of that nature are
20 due by the Government, so I would expect the same
21 from the defense.

22 THE COURT: All right. Let me open this up
23 a little bit. Let me tell you what the proposal is
24 as I'm thinking of it. It would be that the
25 Government is going to do the document production

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1 that they said they would do in two weeks, they'll do
2 it by 5:00 on the 17th. And that will give us a
3 fighting chance of maybe having some of that material
4 in the defendants' hands so we can talk about
5 problems, if any, the following week. They would
6 also give a good faith best statement of their
7 witnesses, with the inclination being overinclusive
8 rather than being underinclusive. I would not be
9 pleased, and I don't think the defendants would be if
10 they were adding names after that point, since the
11 whole purpose of this is to try to set some deadline
12 to get Giglio material.

13 I'm not ruling at this point what's Giglio
14 and what's not Giglio. I'm simply trying to
15 facilitate getting the material in. And we'll talk
16 about Giglio, what is in and out of the box as we go
17 through the next two days.

18 We would then set another date for the
19 April trial, on February 5, for them to give you the
20 same list for the April 9 trial. That's the proposal
21 on the table. I'm leaning toward it.

22 Let's see, who wanted to speak? Ms.
23 Sirignano, did you want to speak earlier on this?

24 MS. SIRIGNANO: I did, Your Honor.

25 THE COURT: What do you think about the

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1 proposed?

2 MR. CASTLE: Just wanted to interrupt. I
3 thought the Court was talking about January 17, when
4 I was up to the podium last.

5 THE COURT: I'm talking about November 17.

6 MR. CASTLE: I wanted the Court to know
7 that's what I thought we were talking about.

8 THE COURT: You like it better.

9 MR. CASTLE: If I sounded a little strident
10 than I should have.

11 THE COURT: You're pretty controlled. If
12 that's strident, I'll take that any day.

13 MS. SIRIGNANO: Your Honor, just for the
14 record, and I do like --

15 THE COURT: Let me ask Mr. Castle, could
16 you live with that, though? You like the proposal
17 now?

18 MR. CASTLE: Yes.

19 MS. SIRIGNANO: I guess I will start out
20 that way. The proposal is fine. I'm not in the
21 second wave, I'm in the first wave, Judge.

22 THE COURT: I know.

23 MS. SIRIGNANO: And so, all along, though,
24 however, I'd just like to make it very clear that the
25 deadlines in the scheduling order have been for both

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1 waves. So we've been held to that standard.

2 THE COURT: There is, there is. I realize
3 that, that we have been sticking with it. But we're
4 only varying this primarily to get documents, I
5 think -- correct me if I'm wrong, Mr. Beck -- the
6 idea of having a separate deadline, I think Mr.
7 Castellano was making this point, it will facilitate
8 people in the first trial getting things quicker,
9 right? You're not dealing with 15 people, you're
10 dealing with six.

11 MR. BECK: That's right, Your Honor.

12 THE COURT: So I would think from your
13 standpoint that would be a plus.

14 MS. SIRIGNANO: Yes, Your Honor, I agree.
15 So, in that regard, I don't have any issue. I just
16 was pointing out that --

17 THE COURT: It is. And I'm staring at the
18 fourth scheduling order. I'm not suggesting we make
19 any big changes. It was just trying to address Mr.
20 Castle's point of the Government is trying to decide
21 what their witness list is. And I thought, well,
22 okay, let's have an early production of witness
23 lists, and see if that can bring my prior rulings --
24 give it a deadline.

25 MS. SIRIGNANO: Thank you, Judge.

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1 The only other thing that I wanted to say
2 was that I had filed, with a number of joined
3 defendants, Document 1329, which was not teed up
4 today. It was teed up -- it's the order to show
5 cause. And I just raise it. The Government
6 responded in Document 1401. This was the order that
7 the Court made in the May 9 and 10 hearings. Mr.
8 Castle was talking about June. But this was your
9 order from May, May 9th and 10th.

10 And so there is a number of items there
11 regarding specifically Giglio and Brady and Rule 16
12 that were not addressed in the Government's response.

13 So I'm happy to stay this until another
14 time when the Court is prepared to address this and
15 the Government is prepared. But I just wanted to let
16 you know that there are some things from May 9th and
17 10th of 2017, which the Court had already ordered
18 that have not yet been produced, nor addressed by the
19 Government in its response.

20 THE COURT: Well, two things. One is, as
21 you can tell -- and these are discussions that I
22 think Ms. Wild has had with some of y'all -- the
23 proposed plan has 1329 being in the December 18, 19
24 period. But I don't mind using the next two days to
25 take issues and start trying to give some calls, so I

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1 can give you maximum guidance when we leave here.

2 And if then y'all want to move up, you can talk to
3 Ms. Wild a little bit about that.

4 Am I making a mistake here?

5 (A discussion was held off the record.)

6 THE COURT: Well, let me just say this to
7 everybody. It would seem to me, if I'm down here and
8 I can give them guidance on issues, it would be
9 better if I gave them the guidance they want.

10 You don't like that?

11 (A discussion was held off the record.)

12 THE COURT: Well, let's play it by ear.
13 Maybe I need to be more disciplined, and take them by
14 motions. But I was earlier encouraging us to try to
15 do form over -- substance over form. And that meant
16 maybe not taking motions. Maybe what we can do to
17 help keep this docket clear is, if I gut out a motion
18 with a bunch of rulings --

19 MS. SIRIGNANO: Yes.

20 THE COURT: -- maybe we can all say, Judge,
21 you took care of all that, and we can either withdraw
22 it or just indicate that we've taken care of that.

23 MS. SIRIGNANO: Indeed, Judge. Because I'm
24 requesting Giglio in my discovery motion. And I'm
25 sure there are others that have addressed Giglio, in

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1 Mr. Perez', Mr. Sanchez', Mr. Herrera's motions that
2 if it's ruled upon once, I don't know why we'd have
3 to revisit it.

4 THE COURT: Okay. Well, just keep that in
5 mind, everybody, if we can help the Court. And if we
6 gut out a motion, because they've taken issues, help
7 us out, and maybe we can pull some of those off or
8 withdraw them or deem them ruled on in some way.

9 MS. SIRIGNANO: Thank you, Your Honor.

10 THE COURT: All right. Thank you, Ms.
11 Sirignano.

12 Anybody else want to say anything about the
13 proposal on the table?

14 MR. LOWRY: If I may.

15 THE COURT: Mr. Lowry.

16 MR. LOWRY: Your Honor, I agree with the
17 Court's proposal. I like that, the substance of it,
18 gutting out motions. I have a stand-alone
19 Brady-Giglio motion I think your ruling just
20 neutralized completely.

21 Your Honor, I just want to make sure I
22 understand the scope of the disclosure correctly.
23 Because in my thinking, when we were talking about
24 Brady and Giglio information, in terms of the
25 benefits, it's not just the payments, *per se*, cash

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1 payments, but all kinds of other incentives or
2 inducements provided to cooperating individuals:
3 Lump sum meritorious awards, you know, fixing traffic
4 tickets, fixing arrest warrants, favoritism given to
5 people, to their families, to their loved ones.

6 THE COURT: Well, I'll say this: I read
7 your list, and -- I think it was your list where you
8 listed that out -- as a general matter, I think I
9 agree that is Giglio material. Did you have any
10 disagreement with that list? I think it was in Mr.
11 Lowry's motion, Mr. Beck. Did you have any
12 disagreement that that was probably a rather
13 detailed, but good list of what --

14 MR. BECK: Benefits provided to spouses
15 and --

16 THE COURT: Right, right.

17 Now, when you say you're going to produce
18 the compensation, are you thinking it's going to
19 include such an extended list here, or are you
20 thinking that you're probably just producing the
21 cash?

22 MR. BECK: I'll look through it. I know
23 we're producing cash that's paid to their commissary
24 accounts and cash that's paid to them. I can't say
25 for certain as I stand here, because I haven't looked

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1 through it all, whether that's included. But I
2 understand Mr. Lowry's point.

3 THE COURT: At some point you would agree
4 that that has to be produced, but it may not be in
5 this bundle that you're trying to get together by the
6 17th?

7 MR. BECK: Right.

8 THE COURT: All right. So if we have an
9 agreement -- and now you get the witness list, so the
10 witness list begins to put pressure on the
11 Government, because I've already had a ruling it's
12 immediate with Brady material.

13 MR. LOWRY: Understood, Your Honor. I just
14 wanted to --

15 THE COURT: Pretty good shape?

16 MR. LOWRY: Absolutely.

17 THE COURT: Okay. All right.

18 MR. LOWRY: Thank you.

19 THE COURT: Anything else, Mr. Lowry?

20 MR. LOWRY: No, Your Honor.

21 THE COURT: Anybody else? Mr. Burke?

22 MR. BURKE: Thank you, Your Honor.

23 Forgive me for being a bit greedy, but I
24 like the compromise a lot. When you said a list of
25 witnesses, it was music to my ears, because it drives

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1 so many things.

2 What I am asking for on behalf of my
3 client, who is charged in Counts 1 and 3, those are
4 historic homicides going back to 2001 and 2007.

5 Those cases have no physical evidence to speak of.

6 Those are cases that are based entirely on informants
7 that the Government intends to use. I am wondering,
8 and I am asking and requesting that our list of
9 witnesses also be pegged to November 17. Not the
10 Giglio or Brady materials. And then that will enable
11 us during the two or three months, while you're tied
12 up with Group 1, to be doing some of our due
13 diligence, so that we can work for our client if we
14 have that list.

15 And I would say to Your Honor that these
16 three prosecutors are very bright, and they could
17 tell you if they stood up here to a 90 percent
18 certainty exactly who those witnesses would be,
19 because they're historic figures going back talking
20 about what they believe happened in 2001 and 2007.

21 So that is my request, that as to the list
22 of witnesses for the early counts that we be given
23 that on November 17, skipping the Giglio and Brady
24 material until after the trial of Group 1.

25 THE COURT: So you say give a witness list,

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1 but not -- but delay the production of Brady and
2 Giglio material?

3 MR. BURKE: Yeah. The names, but not the
4 stuff. And with the flexibility that you've talked
5 about, you know, understanding that they may hear
6 something in the trial of Group 1, where they're
7 going to want to add somebody, or they're going to
8 want to take somebody off. So it's a good faith list
9 that we can work with while Group 1 is forging ahead
10 to trial.

11 THE COURT: Thank you, Mr. Burke.

12 MR. BURKE: Thank you.

13 THE COURT: Well, what I understand is the
14 offer on the table, you might be interested in it.
15 Mr. Castellano was talking about the two month -- we
16 were kind of pegging it to two months. But what is
17 also being offered is you don't have to mess with
18 their Brady and Giglio material until after the
19 trial. I don't know how everybody else is going to
20 feel about that, but if everybody was to buy into
21 that -- if you sit down, you might want the
22 trade-off, if you spend a little bit of time putting
23 a witness list together for them that then -- and
24 then -- but you can delay the -- your November 17th
25 date until after the first trial, that might be

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1 something you're interested in.

2 MS. ARMIJO: Your Honor, quite honestly, I
3 don't think we're interested, because when we're
4 going to be doing the disclosures that you request,
5 that they're requesting, we're going to be doing it
6 for everybody.

7 For instance, the jail calls, which despite
8 the allegation that they haven't received a lot of
9 things, we've already done a significant amount of
10 that back in 2016. I won't go into that right now.
11 But we're going to be providing it for all of the
12 cooperators, for all. For instance, jail calls have
13 been requested of several people. We're going to go
14 back to -- I believe initially we said January
15 2015 -- but we're going back to January 2014, to
16 present, to any of these defendants that were in
17 custody -- that's all of them -- is my belief is what
18 we requested. What we requested was people who are
19 in the New Mexico Corrections Department, all of
20 their calls from that date to present.

21 So they're going to get not only
22 cooperators or former co-defendants that are now
23 cooperators, but their own calls as well. So we're
24 doing things in blankets that apply to everybody.
25 We're not agreeing to -- and we'll get to this

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1 later -- jail calls as to people in the U.S.
2 Marshal's custody, if we don't have it. But what we
3 have we're giving to everybody.

4 So quite frankly, Your Honor, it would be
5 easier to do the November 17th -- what I'll refer to
6 as the first five defendants that are going, Javier
7 Molina murder, and then some murder conspiracies, it
8 would be easier to do that witness list, and then do
9 what we were planning on doing anyway, what Mr. Beck
10 was talking about, all the things that we were going
11 to be doing anyway. Because I think that will take
12 care of what we've already been planning on doing.
13 And then later doing the witness list for the other
14 group. Because the other group still has more
15 murders, and right now still has nine defendants.
16 And that would be more time consuming, and taking
17 away our ability to be reviewing all of the discovery
18 that we still have to do now by the 17th of November.

19 THE COURT: Let me ask you -- and I'm not
20 trying to tell you over at this table how to answer,
21 but since Mr. Castellano brought it up earlier, to
22 address Mr. Burke's issue, I just pulled the February
23 5th date out based on two months. Could you move up
24 a little bit that witness date? We don't touch the
25 Brady-Giglio rulings or deadlines, but we just --

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1 could you move up your date a little bit to give them
2 a little bit earlier a witness list for that second
3 trial, so they could be working on it?

4 MR. CASTELLANO: We're already going to be
5 in trial in the Molina murder case. And so we'll be
6 trying the case and trying to get disclosure prepared
7 at the same time. I don't think we can get -- we
8 already have a deadline that we've set for certain
9 things. And of course, we'll abide by that. But if
10 we add to that, it's going to be that much more
11 difficult.

12 THE COURT: All right. Let me listen a
13 little bit. Ms. Sirignano?

14 MS. SIRIGNANO: Judge, thank you. We
15 received notice from Mr. Aoki, the discovery
16 attorney, that approximately 218 gigabytes of phone
17 calls are coming. We presume that these are jail
18 calls. We weren't told what kind of calls they were,
19 but that they were coming. And that's a massive,
20 massive amount of phone calls. I remember one of the
21 very first hearings that we had Mr. Baca's attorney,
22 Marc Lowry, asked the Government for his client's
23 jail calls. And so this is something that's been
24 going on since the very beginning of the case. The
25 defense has been diligent. We have IPRA'd the

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1 facilities, New Mexico Department of Corrections,
2 asking for these phone calls. And DOC's response is
3 that they are in the custody of the Government; that
4 the Department of Corrections is part of the
5 prosecution's arm now, and they're not going to be
6 giving us those phone calls.

7 And so this is an issue, Judge, that could
8 derail not only the fourth scheduling order --

9 THE COURT: I guess I'm lost. If you're
10 about to get a large amount of phone calls, why is
11 the Department of Corrections still making any
12 decisions here?

13 MS. SIRIGNANO: This was done earlier,
14 Judge, months ago, months ago.

15 THE COURT: All right. But you're about to
16 get them?

17 MS. SIRIGNANO: Well, I don't know what
18 we're getting, Judge.

19 THE COURT: I know.

20 MS. SIRIGNANO: We were just told we were
21 getting 218 megabytes, which is a huge number of
22 calls, thousands.

23 THE COURT: What's the problem?

24 MS. SIRIGNANO: The problem is that we've
25 been asking for these for months and months and

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1 months and months. And I do understand the
2 Government has the Molina trial that they're getting
3 ready for. We've got the first wave that we're also
4 getting ready for. But the pure number of phone
5 calls that have to be listened to, reviewed, Brady
6 determined, Giglio determined, Rule 16, Jencks, it's
7 just going to be impossible if we don't get these
8 calls earlier, both waves 1 and 2.

9 THE COURT: It sounds like they're in
10 Aoki's hands?

11 MS. SIRIGNANO: Not yet, Judge. We were
12 told they were coming. But I guess there was some
13 kind of difficulty with the external hard drive that
14 was provided to actually get these calls.

15 And so, Judge, just respectfully, we're
16 running out of time here, with the holidays, and
17 January is coming. And I've had literally three
18 women, my staff, paralegals, listening -- no, four --
19 listening to phone calls from the Government's
20 discovery that we received, and then other relevant
21 phone calls.

22 And so I just want to alert the Court and
23 everybody, the longer this goes on, and the longer
24 the delay in actually obtaining these phone calls --
25 which of course we tried to get -- it's going to be a

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1 very big burden on the defense, Judge.

2 THE COURT: Okay. Thank you, Ms.

3 Sirignano.

4 MS. SIRIGNANO: Thank you, Judge.

5 THE COURT: All right. Mr. Villa? I've
6 never known you to creep to a microphone.

7 MR. VILLA: Usually run right up, Judge.
8 But they put me up in the box today.

9 THE COURT: I thought you were coming out
10 of the exit door.

11 MR. VILLA: I like the proposal that the
12 Court has submitted for Counts 6 through 12. I don't
13 want to jump into the fray for the other counts. But
14 I wanted to highlight one issue for the Court that is
15 a Giglio issue in my view, and something that the
16 Court has previously ruled upon for Mr. Perez.
17 Because in the Molina count, if you recall, the
18 initial folks, who are now some of them cooperating
19 co-defendants, had made statements that didn't
20 include Mr. Perez, didn't mention him, he wasn't
21 involved. It just didn't come up. The Court made a
22 ruling that the plea agreements, the debriefs, the
23 302s from the debriefs, the 5K agreements attached to
24 the plea was something that the Government had to
25 disclose. And the Government did that.

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1 But recently, another co-defendant, Mario
2 Rodriguez, entered a plea. I don't know whether it's
3 a cooperation plea. But if I went to Vegas and put a
4 bet on it, I'd be betting that it is, based on how it
5 looks.

6 And we've asked the Government, along the
7 same lines, to disclose those same things as Giglio.
8 The Government disagrees that that's Giglio. This
9 all happened very recently, so we haven't been able
10 to file motions. But given our time crunch, I wanted
11 to highlight that.

12 THE COURT: Now, I could be wrong -- and
13 you can correct me, and Mr. Beck can -- there was an
14 agreement to produce Mario Rodriguez' material, but
15 the Government preserved its position that it wasn't
16 Giglio material, but it's going to produce it to get
17 it in the hands. So it was more of an agreement than
18 it was a ruling that it was Giglio. Is my memory
19 off?

20 MR. CASTELLANO: The agreement, Your Honor,
21 as to Mr. Rodriguez was something that is coming out
22 in the next round of discovery. And those were the
23 disciplinary packets related to the Molina murder.
24 So the Corrections Department had its own
25 disciplinary hearings, and we disclosed those, I

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1 think, that day. So that is what we were talking
2 about when it came to Mr. Rodriguez and his trial.

3 THE COURT: But when you were doing it, you
4 weren't conceding that that was Giglio material, you
5 were just getting it into his hands, if I recall.

6 MR. CASTELLANO: That's correct, Your
7 Honor.

8 THE COURT: Do you recall it differently,
9 Mr. Villa? I didn't think I made a ruling. I
10 thought the Government sort of said, We're just going
11 to get it in your hands because of the time that we
12 were working.

13 MR. CASTELLANO: Mr. Villa wasn't there.
14 That was Mr. Rodriguez' hearings only, so there were
15 no other defense counsel present. I made that
16 representation to the Court that we did receive
17 those. And we turned those over early to him because
18 his trial was set.

19 What Mr. Villa is asking for is the plea
20 agreement and any debrief reports, and any addenda to
21 the plea agreement. We informed him the plea
22 agreement is already on the docket. He has those.
23 The statement does list his client in the factual
24 basis. So we know that it's not exculpatory as to
25 Mr. Perez.

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1 The plea addendum hasn't been disclosed --
2 will be -- it's the same thing as the other addenda,
3 so that shouldn't be a surprise.

4 The reports themselves will be Jencks.

5 THE COURT: The 302s will be Jencks?

6 MR. CASTELLANO: Yes. And I'm not even
7 sure those are finalized yet, they're so new.

8 And the other distinction which was made in
9 the email was that people like Mr. Montoya and Mr.
10 Armenta had previously made statements, so any more
11 recent statements could be contradictory to the prior
12 statements, and therefore, possibly Giglio.

13 Mr. Rodriguez is not in that position. So
14 we don't have prior statements like the other
15 individuals did. That's the concern that Mr. Villa
16 had was whether or not it's Giglio. But I think at
17 this point it's strictly Jencks.

18 THE COURT: What do you see as problems
19 there?

20 MR. VILLA: Here's the problem, Judge, is
21 maybe they don't call Mario Rodriguez, or maybe they
22 don't call one of the other co-defendants. But the
23 first round of statements made by the co-defendants,
24 that is now different from what they're saying once
25 they've entered cooperation agreements, is

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1 contradicting what -- part of what Mario Rodriguez
2 says in his debrief, because I've read the factual
3 basis in the plea agreement. So that impeaches
4 either Mr. Mario Rodriguez, if he's going to testify,
5 or it impeaches the other cooperating co-defendants,
6 if they're going to testify. What Mr. Rodriguez said
7 in his debrief will contradict what these other --
8 what we would predict testifying co-defendants are
9 going to say, because we know what they said in the
10 beginning, which did not mention Mr. Perez. And so I
11 think that is impeachment. That is Giglio.

12 THE COURT: So I understand what you're
13 saying, we're focusing on the 302s, the debriefs,
14 after Mr. Rodriguez pled?

15 MR. VILLA: Yes, Your Honor.

16 THE COURT: All right. And you're saying
17 that there is going to be statements in there that
18 you would then use to impeach another witness, right?

19 MR. VILLA: Another cooperating
20 co-defendant.

21 THE COURT: Another cooperating, because
22 they would be inconsistent.

23 MR. VILLA: Inconsistent with some of the
24 statements the other cooperating co-defendants have
25 made.

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1 THE COURT: What's your thoughts -- if this
2 is yours, Mr. Beck, what would your thoughts be about
3 whether that's in or out of the Giglio box; that if
4 you've got 302s, that you've got Mario Rodriguez
5 giving statements that are inconsistent with
6 statements that other people have made, other
7 cooperating witnesses have made, that that's in the
8 box or out of the box? How are you treating that?

9 Let me ask you this: Would you be willing
10 to do this: If the rest of the material -- would you
11 be willing to sit with the 302s, look at it with that
12 eye in mind, and instead of producing the entire
13 statement, you can hold that back for Jencks
14 material, but if there is a statement in there, in
15 which it is inconsistent with another cooperating
16 statement, you produce a redacted 302 that gives them
17 that statement.

18 MR. BECK: Yeah, I mean I'd have to think
19 more about it, but I'm inclined to agree with both of
20 you that that's appropriate material, prior
21 inconsistent statement. I don't know, I'd have to
22 think about the admissibility, if he's -- but I mean,
23 I see the Court's point. And I agree to sit down and
24 think about it and look at Rodriguez --

25 THE COURT: Could you live with that?

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1 MR. VILLA: Just a couple of things. I'd
2 like Mr. Beck to look at the precooperation
3 statements of these other cooperating co-defendants,
4 because those are the ones I'm thinking of. You
5 know, they gave a statement to the State Police, or
6 whoever is investigating this homicide initially,
7 that X happened. And now Mario Rodriguez' statement
8 in the 302 is contradicting X; it's Y. That would be
9 the eye. So not just --

10 THE COURT: That's what I'm thinking.
11 You're just saying instead of just looking at the 302
12 that's been produced on Mario Rodriguez, have in his
13 lap the cooperating statements. He rereads it, so he
14 can refresh his memory as to what's conflicting.

15 MR. VILLA: Pre- and post-cooperation of
16 these other co-defendants. Because they've changed
17 their stories pre-cooperation to post-cooperation.
18 So I just ask that he be looking at both of those,
19 because their post-cooperation statements are
20 probably going to be a lot similar to Mr. Rodriguez.
21 And if you just looked at post-, you'd say, well,
22 that doesn't contradict --

23 THE COURT: So it conflicts with either
24 one.

25 MR. VILLA: And I want Mr. Beck to do it

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1 next week while he's in trial.

2 THE COURT: Are you in trial next week?

3 MR. BECK: No, no, I've got training next
4 week. I'm in trial two weeks after.

5 MR. VILLA: That's when I want him to look
6 at it.

7 THE COURT: Are you doing something fun
8 next week? You just said --

9 MR. BECK: I'm prepping for two trials
10 coming up in the next month, while I'm take basic
11 criminal discovery training at the NAC, so I will
12 learn the right way to do what we're arguing about
13 today.

14 Yeah, I understand. I'll sit down and
15 think about it and read through the reports.

16 THE COURT: Well, let's do this: If you
17 want to come back and argue with me before we leave
18 town tomorrow, you can, but for the present time that
19 will be the ruling.

20 MR. VILLA: And, Your Honor, I'm going to
21 go out on the ledge, you're probably not going to
22 like this, but getting back to the black boxes, I
23 don't know what happened. I don't think you know
24 everything that's happened. I know that a lot of
25 things happened after Mario Rodriguez's plea

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1 agreement; things that lead me to believe that
2 perhaps information that he's providing, whether
3 accurate or not, has led to the reason why our
4 clients are in black boxes. So I would just ask the
5 Court to look at that.

6 And we have the same issue with the
7 tablets. It wasn't our clients that were messing
8 with the tablets, it was the cooperating witnesses.
9 And then all of our clients had to suffer to having
10 them taken away. Because I don't know enough about
11 what happened, and that information hasn't been
12 provided to us, I do know that a lot happened
13 following his plea agreement. And some rumor and
14 innuendo and hearsay and speculation around the
15 courthouse leads me to believe that something he said
16 is the reason why our clients are in the black boxes.

17 THE COURT: Well, that's fair enough.
18 That's fair enough. We'll all work together. So
19 talk to the U.S. Attorneys, talk to the marshals, and
20 see if we can move forward on it. But I understand
21 what you're saying.

22 All right. Let me ask this -- I'm going to
23 push you a little bit, Mr. Castellano -- I'm still
24 trying to work with Mr. Burke's issue here. Could
25 you give a witness list -- move it up a little bit

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1 to -- before you step into trial in the Molina case,
2 you give it to them by the end of business on the
3 26th? That will give you two full months from now to
4 think about it. You can be jotting it down. But
5 give them the good faith list by the 26th. Move it
6 up a little bit. It gets it out of your hair, it's
7 not in the middle of your trial. You can give it to
8 them earlier if you want. But before you go into
9 trial, and then you're not messing around with it in
10 trial.

11 MR. CASTELLANO: So we're talking strictly
12 about the witness list; is that correct, Your Honor?

13 THE COURT: Yeah.

14 MR. CASTELLANO: And I take it that's
15 reciprocal, both parties, both sides will be
16 providing witness lists overinclusive on that date?

17 THE COURT: We've been talk primarily about
18 the Government, set some Giglio, but can we make it
19 reciprocal across the board, November 17th, and then
20 Mr. Burke, I don't know if this is helping you a
21 whole lot, but it's a nod in your direction. Can we
22 make it reciprocal on both sides?

23 MS. HARBOUR-VALDEZ: Your Honor, I think we
24 might need a couple of days after we receive their
25 list to decide who our witnesses might be. Is that

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1 fair?

2 THE COURT: How long do you want after you
3 get their list to put your list together?

4 MS. HARBOUR-VALDEZ: A week.

5 THE COURT: A week. Could you live with
6 that, Mr. Castellano? Mr. Beck?

7 MR. BECK: Your Honor, I think something
8 needs to be taken into consideration here. On the
9 front end, this is part of the same indictment. So
10 what some folks refer to as the enterprise witnesses
11 or the enterprise stuff, they will already have a
12 witness list that talks about a lot of these
13 enterprise witnesses now four or five months before
14 trial. For those keeping score, I'm not very good at
15 math. So they'll already have that.

16 They're saying they know who our witnesses
17 are going to be. Well, as I said, our witness list
18 has changed as people have dropped out. And we
19 expect that to happen again in their case, that as we
20 start focusing on that trial, people will drop out.
21 And that will happen sometime in the future.

22 So I think there is a different impetus and
23 a different rationale between making this first
24 witness list early, as opposed to the second witness
25 list even earlier, because they will have the

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1 majority of those witnesses, and we will not know who
2 our witnesses will be to testify to those, because we
3 haven't had an opportunity to try to work on that.

4 And so I think that where we're saying that
5 is a rationale in providing it earlier so we're
6 thinking about it in trial, I think the opposite is
7 true. I think there is a rationale for doing it
8 after the trial, and we can sit down and really think
9 hard about who the witnesses will be for that. And
10 they've already had notice for the majority of those
11 witnesses, because they're enterprise witnesses.

12 And so I don't want to go down this road
13 that -- let's just provide this witness list, because
14 I think the Court's well aware -- we briefed it in
15 the past in relation to this Giglio stuff -- there is
16 no obligation to present the witness list. There is
17 no right for a defendant to have a witness list of
18 the Government's witnesses.

19 So I think we're sort of backing ourselves
20 into an agreement here that really doesn't make
21 sense, when they have these witnesses, the law
22 doesn't provide for it, and it will change
23 drastically.

24 And I worry about the Court's guidance that
25 we shouldn't be underinclusive in our witness list,

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1 because if we provide that before the Molina trial,
2 before we focus, before we even turn our attention to
3 the second trial, the witness list may not be worth
4 anyone's life.

5 And so it's putting a burden on our plate
6 for sure that I don't think we should be under, under
7 the law. But I don't think it makes a lot of sense.

8 So I ask the Court to reconsider moving
9 this back further, and instead, to see how things
10 develop, to see what they're providing in our witness
11 list and our Giglio report here. And if it becomes a
12 problem, then set it for a week or two after the
13 Molina trial, and we can work on a witness list. We
14 can work on plea agreements. We can provide stuff to
15 them.

16 Again, I think they're going to get most of
17 everything they want in this round of discovery. So
18 I'm worried we're backing ourselves into the door,
19 and we're going to get ourselves in trouble with the
20 Court and the defendants for no reason at all. And
21 so I think for this reason we should not move up this
22 second witness list that far.

23 THE COURT: Okay. Let me -- I agree with
24 some of what Mr. Beck is saying, but I don't agree
25 with his conclusion. Let me tweak this just a little

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1 bit, Mr. Burke, and see if this would work for you.
2 So I move up the list; I'm still inclined to move it
3 up so they have to give you a list before the trial.
4 Here's, though, the kicker. If that trial goes away,
5 you come back to me and we'll relook at the due date
6 for the list. Because if for some reason that first
7 trial goes away, then I'm focused, then, on April 9.
8 And you can come back in and say, Okay, Judge, they
9 don't have a trial on January 29 anymore. Can you
10 start pushing the list and the Giglio and that stuff.
11 Could you live with that?

12 MR. BURKE: Yes, I could, Your Honor. That
13 makes sense.

14 THE COURT: Okay. All right.

15 MR. BURKE: May I say one more thing about
16 witnesses? And I'm not a prosecutor, so I don't know
17 how they're going to go about doing this. But it
18 seems to me a logical approach. And it's hard to
19 believe this wouldn't be an approach, is to focus on
20 the witnesses that they need for Counts 1 2, and 3,
21 and so forth. Then if they have additional
22 overarching enterprise witnesses, then they get to
23 those. "Styx" Archuleta, for example, might be
24 someone that fits into that. But they don't begin
25 with the enterprise witnesses and say we just have

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1 this whole morass of witnesses. You're going to be
2 organized and have witnesses designated to --

3 THE COURT: Well, what you and I don't have
4 the advantage of is things are fluid --

5 MR. BURKE: Yes, sir.

6 THE COURT: -- you know, and I think I have
7 a little bit of sympathy, and can try to figure out
8 what they're doing over at that table. If things are
9 fluid, they may be thinking of trials differently
10 than you are, representing one defendant.

11 MR. BURKE: That's true, Your Honor.

12 THE COURT: So let me do this: Let me
13 stick with where we are.

14 So the Government is going to get this
15 production they talked about to Mr. Aoki by the end
16 of business on November 17; 5:00. They will also
17 produce a good faith best estimate of what the
18 witnesses are going to be for the Molina trial on
19 January 29, and pushing everybody to make it
20 overinclusive, rather than underinclusive, so we're
21 not looking at additions that are going to cause
22 problems for us down the road.

23 The defendants will give a list of their
24 witnesses -- same admonitions -- seven days later, on
25 the Molina trial. The Government will then produce

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1 by the end of business on January 26, 5:00, a second
2 list for the April 9 trial. And the defendants will
3 produce a witness list seven days later for that
4 trial as well.

5 Anything else anybody want to talk about on
6 that issue? All right.

7 Mr. Castle, are we back to you? Are we
8 done with you?

9 MR. CASTLE: We rest.

10 THE COURT: You rest. Is there anything
11 else on your motion? Can I move beyond your motion
12 then?

13 MR. CASTLE: Yes, you can.

14 THE COURT: All right. Thank you, Mr.
15 Castle.

16 All right. I'm going to get organized
17 slightly here, and then we will move on to the next
18 issue or next motion.

19 MR. VILLA: Your Honor?

20 THE COURT: Hold on just a second. Let me
21 just get organized so you can disorganize me, okay.

22 Okay. What I'm pulling up -- I'm not
23 ignoring you, Mr. Villa -- what I'm pulling up is
24 going to be Mr. Davis' motion on behalf of Mr.
25 Herrera, the Rule 16 motion to compel. So Mr. Davis,

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1 you've got the floor. Do you want to concede it to
2 Mr. Villa?

3 MR. DAVIS: Judge, it's Ms. Bhalla.

4 THE COURT: Ms. Bhalla, are you going to
5 argue this motion?

6 MS. BHALLA: Yes, Your Honor. But Mr.
7 Villa can go ahead.

8 THE COURT: All right. Mr. Villa, you have
9 the floor.

10 MR. VILLA: Sorry, Judge. As Government's
11 witness list will be due the 17th, ours seven days
12 later, that's the Friday after Thanksgiving. And --

13 THE COURT: Let's make it the Monday, 5:00
14 on the following Monday. Ms. Armijo?

15 MS. ARMIJO: Can we at least then have the
16 following Monday as well to have that weekend?

17 THE COURT: Well, what I was hoping with
18 this is I would -- I could try to deal with as many
19 issues when I'm down here the next week as I could.

20 MS. ARMIJO: And if for some reason that
21 schedule changes, we can revisit this? For instance,
22 I know that several defense attorneys, although I
23 believe the United States will -- is available that
24 week, or at least part of us -- I think a lot of the
25 defense was going to be indicating they were not

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1 available. So I would just ask that, if for any
2 reason the Court is not going to have hearings that
3 week, that --

4 THE COURT: All right. Is everybody
5 agreeable to that; that if this schedule doesn't
6 work, then we allow the Government to have until the
7 end of business on the 20th, at 5:00, if I'm not back
8 down here on the 20th? Not hearing any objection --
9 but if we're going to be back down here, stick with
10 that 17th?

11 MS. ARMIJO: Yes, Your Honor.

12 THE COURT: All right. Okay.

13 All right. Ms. Bhalla.

14 MS. BHALLA: Thank you, Your Honor.

15 Your Honor, I don't think there is a lot to
16 say on this. I did speak with Ms. Armijo. I think
17 that the Government is in agreement to produce the
18 materials that we've requested. I think that given
19 the Court's ruling about Giglio materials being due,
20 I guess, on the 20th now.

21 THE COURT: We're sticking with the 17th.

22 I want to be here on the 20th.

23 MS. BHALLA: The 17th is good for me, too,
24 Your Honor. So if the Government can agree that that
25 will go out in the next batch as well on the 17th, I

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1 think that we'll be fine.

2 MS. ARMIJO: The problem is we're still
3 awaiting -- we can't disclose -- and maybe there are
4 a couple of different things that we've agreed to
5 disclose. Well, we've agreed to disclose all of
6 this. It's just a timing issue.

7 One of the issues that we have is
8 transcripts. One third of them, what we sent out we
9 have back. But we don't have the other two-thirds.
10 If we have the other two-thirds, it will go out. But
11 what we do have, we will give out. So that's fine.

12 THE COURT: Can you live with that?

13 MS. BHALLA: I think so. I mean, we
14 requested these recordings back in December of 2016,
15 so -- and I don't doubt that the Government has been
16 trying to get them to us. But it just seems like
17 sooner rather than later would be helpful.

18 MS. ARMIJO: The recordings, they have.
19 They have all the recordings. What they don't have
20 are the transcripts. And the transcripts just came
21 about within the last month as a result of this
22 motion. So they have the recordings, they have
23 everything related to what is requested.

24 What they're asking for is -- we're going
25 above and beyond, and we are providing pinpoints just

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1 to their team as to incriminating statements that we
2 believe Mr. Herrera made. But I know that they have
3 recordings. And I know the defendants have listened
4 to these recordings, given the debriefs that we've
5 had. So we will turn over the transcripts when we
6 get them, and we'll turn over the ones that we
7 already have.

8 THE COURT: When do you think these
9 transcripts are going to be available, do you know?

10 MS. ARMIJO: I'm told that maybe within a
11 couple of weeks. We made this original request when
12 the original motion was filed, which was mid
13 September. And so I think they got one-third of them
14 done in about a month. So --

15 THE COURT: Are you producing them on a
16 rolling basis?

17 MS. ARMIJO: We'll produce them on a
18 rolling basis.

19 THE COURT: Do you know which ones
20 specifically you're wanting transcribed? Could you
21 send a letter that Ms. Armijo could hand to the court
22 reporter and say: Do these next?

23 MS. BHALLA: Well, Your Honor, the
24 Government actually indicated to us the recordings
25 they believe contained statements against interests.

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1 We've listened to those, and haven't found that to be
2 the case, which is why the Government, I believe, is
3 ordering the transcripts of those particular
4 recordings. So I believe that we've already
5 identified those and that they've identified those.
6 So that's not going to be an issue in determining
7 which ones need to be transcribed.

8 THE COURT: Well, if we're just waiting on
9 the court reporter, can you live with that?

10 MS. BHALLA: Yes.

11 THE COURT: I mean, if we get there the
12 week of Thanksgiving, and you still don't have them,
13 then we can revisit this issue. Would that work for
14 you?

15 MS. BHALLA: Yes. And as long as we get
16 the pinpoints on the rolling basis, and then I think
17 that the certification --

18 THE COURT: Let me make sure I understand
19 what you mean by pinpoints. Once a transcript is
20 produced, then they tell you where it is in the
21 transcript?

22 MS. BHALLA: Yes, Your Honor.

23 THE COURT: But they're not doing that, or
24 unable to do that with the recordings themselves.

25 MS. BHALLA: That's my understanding.

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1 THE COURT: Okay.

2 Am I understanding things correctly?

3 MS. ARMIJO: Yes, Your Honor. And just so
4 we're clear, we are going to point out things that we
5 think are good. But if we're in trial, and we bring
6 out something else that we think is good, and they
7 object, it may just be because the evidence has
8 changed. So we've agreed to pinpoint for the Herrera
9 team, so to speak, things that we feel at this point
10 are incriminating. But we're not going to keep doing
11 their job for them, so to speak. We're doing this as
12 a courtesy in providing this information for them.

13 THE COURT: You look like you're pleased
14 with this courtesy.

15 MS. BHALLA: I think it's --

16 THE COURT: All right. But you understand
17 the rules? You can live with them?

18 MS. BHALLA: I do, Your Honor. I would say
19 that -- how many people have listened to the
20 recordings now on our team, one, two, three --

21 THE COURT: Well, you don't have to agree.

22 MS. BHALLA: No, I don't.

23 THE COURT: I mean, there may be a
24 disagreement on whether it's incriminating or not.

25 MS. BHALLA: That's correct.

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1 THE COURT: I probably can't resolve that.
2 But I guess everybody is going to need to probably
3 stare at them with a judge's eyes to see whether it's
4 going to come into evidence as an admission against
5 interest, or a statement against interest. So
6 everybody is going to have to, at some point, take
7 probably their litigator's eyes off and start looking
8 at it is this thing really going to get into
9 evidence?

10 MS. BHALLA: Thank you, Your Honor. And
11 just for clarification, in terms of the certification
12 packet, do you anticipate that coming out on the 17th
13 as well?

14 MS. ARMIJO: Yes. It's already ready to
15 go.

16 MS. BHALLA: Thank you, Your Honor. That's
17 it.

18 THE COURT: What is the certification
19 package?

20 MS. BHALLA: The certification packet,
21 according to our expert, is a document that was
22 created, that lists the structure of SNM. And so it
23 would address issues about who was in an authority
24 position and who was not, which is relevant to our
25 defense, Your Honor.

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1 THE COURT: Who prepares this?

2 MS. BHALLA: The Department of Corrections.

3 It would be through STIU, I believe, in that

4 classification process.

5 THE COURT: Is this an historical document
6 or is this a document that they're preparing for
7 trial?

8 MS. BHALLA: It's a historical document.

9 Now, it certainly could be something that's been
10 updated over time. And I don't know the answer to
11 that.

12 THE COURT: All right. Okay. Anything
13 else you need on your motion?

14 MS. BHALLA: No, Your Honor. Thank you.

15 THE COURT: All right. How about anybody
16 else? I don't think there is a lot of people that
17 joined this motion, but is there anybody else that
18 has any issue that's related to it they want to bring
19 up? Okay. So we will move beyond what I'm calling
20 motion number 6.

21 And we're going to what I'm calling motion
22 number 7, which, Mr. Villa, is motion to compel Rule
23 16 and Brady material, if ordered, to preserve law
24 enforcement notes. What else on this -- what other
25 issues or rulings do you need, given the response of

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1 the Government on this one, Mr. Villa? Take your
2 time. Take your time.

3 MR. VILLA: Your Honor, Ms. Armijo has
4 offered to discuss with me some of our outstanding
5 issues. Maybe we can set this one aside and do it
6 tomorrow or later today. And she and I can discuss
7 it during a break.

8 MS. ARMIJO: We can discuss it at the next
9 break, Your Honor. Because it would take care of
10 most everything and it would save court time.

11 THE COURT: All right.

12 MR. VILLA: While I have the floor, thank
13 you -- it doesn't have anything to do with this. I
14 wanted to flag something for the Court. I think
15 Ms. Wild is aware of it, and I apologize for filing
16 late, but it's Document 1408 that I filed Monday, a
17 motion for statewide jury pool and jury
18 questionnaire. I don't expect the Court to have made
19 any decisions. But do I understand, at least with
20 respect to the jury questionnaire, that the jury
21 division needs -- they're estimating eight weeks.

22 THE COURT: Yeah. We've got to move on
23 that pretty quick, if we're going to do something on
24 that.

25 MR. VILLA: So the one thing I guess I

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1 could ask the Court to do, if you're inclined, is
2 order the United States to respond in an expedited
3 fashion, so that we can get this questionnaire
4 hammered out.

5 THE COURT: Tell me what your motion
6 requests.

7 MR. VILLA: So two things: One is a
8 statewide jury pool, which I guess we have to get
9 decided, so we know who to send the jury
10 questionnaire to.

11 THE COURT: Tell me why you want a
12 statewide jury pool?

13 MR. VILLA: Well, I think there are a
14 number of issues, Your Honor.

15 THE COURT: What does it get you? As
16 defendants what do you want it for?

17 MR. VILLA: Well, for Counts 6 through 12,
18 a number of the --

19 THE COURT: You want more Sandia Lab people
20 over there in that jury? Is that what you're
21 wanting?

22 MR. BLACKBURN: Farmington.

23 THE COURT: You want Farmington.

24 MR. VILLA: Nortenos, Your Honor.

25 THE COURT: We'll get you some oil guys

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1 over there in the jury box.

2 MR. VILLA: I think there are a number of
3 things that will help prevent venue-type issues and
4 other prejudice, you know. A large amount of press
5 coverage. The Molina incident occurred --

6 THE COURT: Let me ask you this: I don't
7 live down here in Las Cruces, but I don't think there
8 has been any coverage down here about this, has
9 there?

10 MS. HARBOUR-VALDEZ: Yes.

11 THE COURT: Has it been anything like The
12 Journal in the north?

13 MS. HARBOUR-VALDEZ: Your Honor, my
14 understanding is that a lot of times the Las Cruces
15 Sun News picks up the Journal article and repeats it.
16 At least that's what I've found when --

17 THE COURT: Well, I would guess, correct me
18 if I'm wrong, you've got a lot less coverage down
19 here than we have up there, just by location of
20 articles on the front page and stuff.

21 MR. VILLA: Yeah, I don't -- I'm not
22 familiar with Las Cruces.

23 THE COURT: I'll come back to you.

24 MR. VILLA: I have to rely on --

25 THE COURT: Well, just think about it. I

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1 guess I --

2 MR. VILLA: I think it's the cross-section,
3 Judge. You get more than what you get from the
4 southern pool, and if you're in the northern pool,
5 you get more than you got from the northern pool.
6 The Sandia Lab folks, you know, we may or may not
7 want on our jury, but I think we need different
8 mindsets from different geographical locations.

9 The incidents that are going to be tried in
10 6 through 12 are one that, basically, I guess is
11 Santa Fe, because this is the alleged conspiracy to
12 put a hit out on the Secretary of Corrections. And
13 then the Molina murder is down here in Las Cruces.
14 So I think, geographically, a statewide jury pool
15 would be more representative.

16 THE COURT: Well, let me ask you, since I
17 haven't reviewed your motion, are all the defendants
18 on board?

19 MR. VILLA: Yes.

20 THE COURT: They all want a statewide jury?

21 MR. VILLA: All 13, both trials.

22 THE COURT: Now, these are lengthy trials.
23 I know you've got to represent your defendants, but
24 have you thought about jury convenience on this?
25 That's going to be a hardship if you decide to get

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1 some people from Farmington.

2 MR. VILLA: I have, Your Honor. But, you
3 know, when you look at the two maps of the southern
4 division and the northern division, we're going to
5 get people that -- if we're just in the southern
6 division, are going to have to drive three or four
7 hours. They're going to have to stay here. I'm not
8 sure that a couple extra hours that it takes to come
9 down from Taos or Santa Fe or Angel Fire makes that
10 big of a difference, as opposed to the folks in
11 Lovington, Carlsbad, and Hobbs, that are going to
12 have to come here even if we're just in the southern
13 division.

14 THE COURT: Okay. And what was the second
15 point?

16 MR. VILLA: It's the questionnaire, Your
17 Honor. The Government -- we provided it to the
18 Government, and they initially said, "We object."

19 And we said, "Well" --

20 THE COURT: Did you actually provide a
21 questionnaire?

22 MR. VILLA: Yes.

23 THE COURT: It's attached to the motion?

24 MR. VILLA: It is. And I think the
25 Government, you know, initially their feedback was:

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1 We object. And we said, Well -- you know, and it's
2 too long. There are questions we can change, stuff
3 we can cut out. Maybe we can agree on this.

4 THE COURT: Hold on a second.

5 (A discussion was held off the record.)

6 THE COURT: Go ahead.

7 MR. VILLA: Sure, Judge. And the
8 Government said, Okay, we'll look at it with that
9 eye. And then I think we just kind of ran out of
10 time. So I filed a motion in a sense to press the
11 Government and the Court to get this issue resolved,
12 so if we can get a questionnaire issued in time to
13 have it back, you know, we'd need at least a week or
14 two to review it.

15 THE COURT: Anybody else on the defense
16 side want to say anything about this issue?

17 MR. VILLA: The one thing I'll add -- I
18 know you haven't seen it -- I did cite to the Court
19 some other decisions that you have made on this
20 issue. And to the extent that that can help you --

21 THE COURT: What did I say?

22 MR. VILLA: Well, you gave the
23 questionnaire --

24 THE COURT: Was it SEC?

25 MR. VILLA: You know, I think that may have

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1 been one. Rodella was another. Vigil -- and in all
2 the cases, I believe, you did grant the
3 questionnaire. And the statewide jury pool, it was a
4 mixed bag.

5 THE COURT: When did I deny the statewide?

6 MR. VILLA: I believe in Vigil you denied
7 it.

8 THE COURT: Well, I had to in that, because
9 what happened on that is Gorence asked for the trial.
10 But the way our jury plan was written at the time --
11 no, he did not ask for a statewide. What he did is
12 he asked --

13 THE CLERK: Vigil was Bregman.

14 THE COURT: You're talking about Rodella,
15 right?

16 MR. VILLA: Well, I think it came up in
17 both. But I think what Ms. Wild is reminding the
18 Court is that Vigil was Bregman, not Gorence.

19 THE COURT: Right. But Vigil, we did do a
20 statewide.

21 MR. VILLA: So maybe I had them backwards.
22 I think in Rodella it was denied, and Vigil it was
23 granted.

24 THE COURT: Here's what happened in
25 Rodella. What Gorence wanted was he wanted --

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1 because I could not get the courthouse in Santa Fe,
2 he wanted to have a Santa Fe venire, which I somewhat
3 agreed with. But then we looked at our jury plan,
4 and the jury plan required that the venire come from
5 the location where the trial was. And remember back
6 then, we had a Santa Fe venire, then we a central, we
7 had three -- and then we had in the south. I don't
8 think he wanted a statewide venire, which is
9 interesting. You might give that some thought. I
10 don't think he wanted a statewide venire. He wanted
11 a Santa Fe venire. And you can think of maybe the
12 reasons why.

13 MR. VILLA: We'll take a Santa Fe one,
14 Judge.

15 THE COURT: You'll take a Santa Fe one.
16 But here was the upshot of that is, when we
17 looked at the plan -- I made a pitch that no jurors
18 were coming from Santa Fe. Because if you're having
19 a criminal trial, you almost had to do it in
20 Albuquerque. And then, that meant that you couldn't
21 do the venire from there. So we were not using,
22 really, the people up in Santa Fe, Taos, Raton. So I
23 made a pitch to abolish that. And so that's what we
24 did. We abolished that, so now I've got a north and
25 south.

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1 So I don't think -- I think if I could have
2 had an agreement on that, I probably could have done
3 it. But I think the Government objected. And so our
4 jury plan was such that it didn't give me the
5 flexibility. It gives me the flexibility now, so
6 it's been rewritten to allow a statewide venire. And
7 then it abolished the north. So I think what you're
8 asking is permissible. It's just a question of
9 whether to do it or not.

10 Disagree?

11 THE CLERK: No, I don't disagree.

12 THE COURT: Anybody else want to comment on
13 that? I want to hear from the Government, so you may
14 want to hear what the Government has to say.

15 MR. VILLA: And, Your Honor --

16 THE COURT: You're not remembering stuff
17 again, are you, like Mr. Blackburn?

18 MR. BLACKBURN: It's yesterday, so I've got
19 to help him out.

20 MR. VILLA: I had to sit through dinner
21 with him last night with all these memories.

22 MR. BLACKBURN: Those were Mr. Cooper's
23 memories.

24 MR. COOPER: That he would like to forget.

25 MR. VILLA: Mr. Sorrell, Lincoln Sorrell,

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1 we visited with Lincoln yesterday when we were here,
2 and he did say he'd be available to the Court if you
3 had questions about some of these issues.

4 THE COURT: Okay. Thank you, Mr. Villa. I
5 love Lincoln Sorrell, but it's probably better you
6 stay with Ms. Wild here. Don't end run her. You
7 know, it's probably not a good idea. So I encourage
8 you to keep your contact with Ms. Wild. Don't try to
9 end around.

10 I'll come back -- well, go ahead.

11 MS. SIRIGNANO: Judge, the only thing that
12 I was going to say is that all the media coverage was
13 briefed in 4275, and we're happy to refile that
14 motion here in 4268. That lists out all the articles
15 that Mr. Villa --

16 THE COURT: I'm sorry. Don't give me
17 numbers because I get confused.

18 MS. SIRIGNANO: I'm sorry. In Mr. Garcia's
19 drug case, the 15-CR-4275.

20 THE COURT: Yeah.

21 MS. SIRIGNANO: We filed a very extensive
22 motion, if you recall, with all of the media articles
23 that we had found up until that point. There have
24 been subsequent articles.

25 And just as a reminder to the Court, the

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1 problem isn't The Journal or the Las Cruces paper.
2 There has actually been articles in the El Paso
3 paper. But the television picks it up. All the
4 major networks, both in Albuquerque, here, and as
5 well as social media. I've seen significant media
6 coverage of this case over Facebook, Twitter, and the
7 other social media outlets that people look at.

8 THE COURT: I'll ask you the same question
9 I'm asking Mr. Villa: Let's assume all that is true,
10 I still think it's probably less down here than up
11 there. Let's assume that's true. How does doing a
12 statewide venire help you on that?

13 MS. SIRIGNANO: I think it lessens the
14 exposure that the defense has to worry about. And
15 why use the pool so we can cast the net broader, to
16 make sure that there isn't any juror poisoning from
17 all of the media articles.

18 THE COURT: I'll get you some folks out of
19 Jal that don't know anything about this case.

20 All right. Thank you, Ms. Sirignano.

21 MS. SIRIGNANO: Thank you, Judge.

22 THE COURT: The reason I want to go ahead
23 and discuss this a little bit -- I know the motion
24 just got filed -- is this is an extremely tight
25 schedule. Ms. Wild is right now is seeing if we can

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1 do this. And if we do, what kind of deadlines we
2 have. Let's take the first issue about a statewide
3 venire. What's your thoughts on that?

4 MS. ARMIJO: Your Honor, our thoughts are
5 we would agree with the Court's proposition that the
6 media coverage here has been far less than up north.
7 And if you remember, with the Chris Garcia case and
8 with that motion -- and not that we are inviting a
9 motion to be filed in this case -- but the majority
10 of those were all articles that occurred up north,
11 not down south here.

12 And the primary concern is juror
13 convenience. Because if we are going Monday through
14 Friday, and we end at Friday, 5:00; and let's just
15 say we get somebody from Farmington, you know, that
16 isn't just a couple of added hours, that's a seven,
17 eight-hour drive I believe from down here. Or even
18 for, say, we get somebody even further away. When
19 we're down here -- I think Albuquerque is more
20 centralized than Las Cruces, per se. But down here,
21 we may get people, if you pick some people from up
22 north, that would have a very difficult drive. If
23 we're doing it in January, it snows up north. I
24 mean, if they're going to be driving late at night
25 home, it's going to make it impossible for them to

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1 have any type of home life, if they're picked up that
2 far. And it's just a hardship on them. So that's
3 primarily our reasons, Your Honor.

4 THE COURT: Well, those sound like good
5 reasons to try it in Albuquerque.

6 MS. ARMIJO: Yeah, but I don't -- yes, but
7 we would disagree with that.

8 THE COURT: All right. Talk to me about
9 the second issue, then, on the questionnaire.

10 MS. ARMIJO: The questionnaire that was
11 provided, we think, for one, we think -- and I'm not
12 sure, I know probably not the learned counsel that's
13 from out of state has never had a trial with you, but
14 certainly probably some of the Albuquerque attorneys
15 have. But those of us sitting at the Government
16 table have -- know that you do a very extensive voir
17 dire; you ask a lot of questions, you're very
18 thorough. I think that the parties can propose voir
19 dire questions for the Court, and follow-up. Because
20 we know that this group is not shy about asking
21 questions certainly. And so the questionnaire, we
22 just oppose it, because it will be burdensome, one;
23 and two, what they have proposed is, I think -- it's
24 quite lengthy, and it's quite one-sided. It goes
25 into -- and I can give the Court examples, but it has

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1 a lot of questions about gangs, about Corrections,
2 and knocking people off that would be conservative,
3 quite frankly, and not giving the other side of the
4 picture. Not going into the people that the
5 Government --

6 THE COURT: I thought that was your
7 picture.

8 MS. ARMIJO: I'm sorry?

9 THE COURT: I thought that was your
10 picture.

11 MS. ARMIJO: That we want conservative?

12 THE COURT: No, I thought you wanted --
13 this was gang members knocking people off. I thought
14 that was --

15 MS. ARMIJO: That is our picture.

16 THE COURT: That is your picture.

17 MS. ARMIJO: What I mean is that their
18 questionnaire is such that they will get a good
19 picture of people that they do not want on the jury
20 pool, on the jury itself; whereas, the one that they
21 proposed to us does not give the United States a fair
22 shake.

23 So if there is one, I think that there may
24 be a lot of work to come up with one in talking to --
25 well, I know that time is short. So if the Court is

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1 inclined to give one, then we need to start working
2 on that right away. But I just don't think -- this
3 isn't a death penalty case. And for once, I will
4 agree with defense that death is different. But this
5 is not death. So we do not need a jury questionnaire
6 to figure out if the jury can decide a death penalty
7 case. So we, quite frankly, are opposed to a jury
8 questionnaire. And we are certainly opposed to the
9 one that they proposed to us.

10 THE COURT: Let me ask a couple of
11 questions. And this is going a little bit deeper
12 into the pretrial conference than we would normally
13 be doing at this point. But I think I need to ask
14 these questions to get a better feel for what we're
15 looking at on the jury. How many jurors is the
16 Government going to be requesting that we seat for
17 this trial? In other words, how many alternates are
18 we going to have?

19 MS. ARMIJO: I think we would need at least
20 four alternates, if not six.

21 THE COURT: All right. Anybody from the
22 defendants want to begin to put -- do you have a
23 different figure? It would be closer to four?
24 Closer to six? So that we're looking at 18 in the
25 jury box, or 16 in the jury box? We'll get chairs.

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1 We can handle that logistics.

2 MR. BLACKBURN: I would say six, Your
3 Honor.

4 THE COURT: All right. Well, let's plan on
5 seating 18 for the jury then.

6 I would have to have my memory refreshed,
7 but how many peremptory challenges are the defendants
8 going to get?

9 MR. CASTLE: Your Honor, we're entitled to
10 10, but the Rule of 24 allows to us request more, and
11 in fact, there is already a draft motion to request
12 additional peremptories. That will be filed shortly.

13 THE COURT: Well, maybe I didn't state the
14 question well. I think you're entitled to 16
15 peremptory challenges. So you're entitled to 16, but
16 is that for the five?

17 MS. ARMIJO: Collectively.

18 THE COURT: That's your question, right?
19 Would it be your position that the five get 16
20 peremptory challenges?

21 MS. ARMIJO: Together?

22 THE COURT: Yes.

23 MS. ARMIJO: Yes.

24 THE COURT: Any disagreement from the
25 defendants?

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1 All right. So let's plan on then
2 defendants get 16 -- does that address your concern,
3 Mr. Castle? Does 16 give you about what you were
4 shooting for?

5 MR. CASTLE: Well, I apparently --

6 THE COURT: You want to up the ante now?

7 MR. CASTLE: The math got fuzzy for me, so
8 I'm not sure.

9 THE COURT: Here's the deal. Let me sort
10 of explain it. It's a little bit more nuanced than
11 that. The Government is going to get 10. The
12 defendants are going to get 16 in total. So the five
13 defendants are going to exercise 16 peremptory
14 challenges.

15 Here's the tricky part, and I'll have to
16 look at the statute, there is a statute on this.
17 After then we have the jurors -- after we have our
18 18th, at that point we know what our 12 are. So
19 that's frozen. So we know 1 through 12, who the
20 jurors are. Then I give to each side -- and this is
21 where I don't know the math; I can't remember -- if I
22 were seating two alternates, then I would give the
23 defendants one peremptory challenge to exercise only
24 against the alternates, and I'd give the Government
25 one peremptory challenge only to be exercised against

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1 the alternates. You can waive it, whatever you want
2 to do.

3 With six alternates, my memory is that it
4 goes. It only goes to --

5 (A discussion was held off the record.)

6 MS. ARMIJO: Your Honor?

7 THE COURT: Hold on just a second here.

8 (A discussion was held off the record.)

9 THE COURT: Let me clean something up. I'm
10 wrong. It's only 10 peremptory challenges for the
11 defendant. So you will have to move if it goes
12 beyond --

13 MS. ARMIJO: 16.

14 THE COURT: 16 together. But I'm going to
15 look at the statute. There is a statute on the
16 alternates I need to -- my memory is that it goes up
17 by one for every two. So I think you're going to get
18 three extra peremptory challenges on each side to be
19 exercised against the alternates. But we'll check
20 that.

21 All right. Now, somebody was going to say
22 something, and I can't remember who was going to say
23 what. But I'll go back to you, Ms. Armijo.

24 MS. ARMIJO: Your Honor, I believe it is
25 Rule 24.

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1 THE COURT: It's a rule.

2 MR. BLACKBURN: It's a rule.

3 MS. ARMIJO: Rule 24(c)(4)(C).

4 THE COURT: What does it say?

5 MS. ARMIJO: It says three additional
6 peremptory challenges are permitted when five or six
7 alternates are impaneled. So we'll get three each.

8 THE COURT: All right. So everybody clear
9 what we're going to do? And then you've got a motion
10 for more peremptory challenges?

11 MR. CASTLE: Yes, Your Honor.

12 THE COURT: All right. But we're going to
13 treat them as joint. So what are you requesting,
14 Mr. Castle? How many additional were you asking for?

15 MR. CASTLE: Well, Your Honor, we floated
16 over a motion with that aspect blank to get the group
17 consensus. And we haven't been able to get
18 consensus, just because everybody has been busy
19 getting prepared for this hearing.

20 THE COURT: Do you have a range?

21 MR. CASTLE: I think mine was, because of
22 the number of defendants, we were asking for ten
23 additional peremptories. But of course, we've always
24 been -- well, we haven't -- horse trading goes on
25 west of the Mississippi, so I understand that there

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1 might be a different position from the Government.

2 What I haven't done, Judge, is to see what
3 the courts have done locally in complex cases, to
4 see -- there are cases where they granted extra
5 peremptories, and I'm trying to get a feel for what
6 other courts have done.

7 THE COURT: It's not going to be very
8 encouraging. It's just hard to talk us into it, even
9 in the most complex cases, just because -- here's the
10 problem: If you start passing out that many
11 peremptories, let's say we get 46, which would be
12 about a standard number for just a routine trial.
13 You get about 46 jurors in there. I've got 16
14 peremptory challenges total. Then I've got to add on
15 now three. So I'm up to six. So that gives me 22.
16 And then let's say I'm going with about -- what was
17 my last trial? Maybe about 11 for cause challenges.
18 It's going to be higher on this. It just makes it
19 hard for y'all, and for the Court, and for the
20 Government to try to do a voir dire. It's just
21 tough.

22 And so, I know you'd like to have more
23 peremptory, but what you give up on the other side is
24 you've got a whole roomful of people you're trying to
25 deal with. You know, it's always Juror No. 51 back

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1 there that yaps up, and everybody knows they're not
2 going to be selected. And they just chatter. You
3 know, we've all been there, right?

4 So give it some thought. I'm not saying
5 no. But, you know, you get a little bit more with
6 the peremptories, but you also give up that sort of
7 intimacy you get with a smaller venire. And I work
8 real hard to try to reduce the venire that you have
9 to a manageable level, so we have a good voir dire
10 without running out of jurors. And I'll tell you
11 what, I've sweated it at times, but I've always
12 gotten a jury without maybe sacrificing a little bit
13 of intimacy.

14 So I don't know if that's any guidance.
15 I'm not saying no. It sounds like y'all need to
16 think a little bit about what you're going to ask
17 for.

18 Mr. Castellano.

19 MR. CASTELLANO: Your Honor, if we can
20 change topics back to the questionnaire itself. I
21 think there are two issues. One is should we have a
22 questionnaire, and two is what's going to be in that
23 questionnaire? And what Ms. Armijo alluded to with
24 problems with a questionnaire are --

25 THE COURT: Let's do this. I am way over

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1 with Ms. Bean. I was having so much fun talking
2 about selecting a jury that I just let the time get
3 away. Let me let you speak to us after the break.
4 So we'll be in recess for about 15 minutes.

5 (The Court stood in recess.)

6 THE COURT: All right. Mr. Castellano.
7 You were going to give me two reasons why we
8 shouldn't do a questionnaire.

9 MR. CASTELLANO: Yes, Your Honor. And I'm
10 only going to cover three questions from the
11 questionnaire. I don't think we need to go over the
12 whole thing. So this is page 18 of the
13 questionnaire, Question 87A. "Would it matter to you
14 that becoming an informant was their only avenue to
15 avoid the full consequences of their actions?"
16 That's a loaded question, because any defendant in
17 this case has multiple ways of avoiding the
18 consequences, including going to trial, or motions
19 practice. And cooperation is another one. So I
20 think that's somewhat of a loaded question.

21 Question 88, once again referring to
22 informants, says, "How do you feel about the
23 truthfulness of that testimony," when they haven't
24 heard it yet. So they're kind of loading that up by
25 saying they're going to be lenient, how do you feel

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1 about it? And the Court is already going to give an
2 instruction as it relates to cooperators.

3 The next on Question 90B says, "Will you
4 stand for the right of every juror to vote their
5 decision in the manner they feel is appropriate?"
6 That's not what the law says. The jurors can vote in
7 a way they think is appropriate. They have to vote
8 in conformance with the Court's instructions. So not
9 only I don't think we should do it, but the question
10 is whether or not we're going to have any agreement
11 on questions especially such as that. That's just
12 simply not what the Court is going to instruct them
13 to do. They can't do what feels right to them. They
14 have to follow the Court's instructions. And this
15 instruction tells them that that's not necessary, or
16 at least suggests that.

17 So those are just three examples, Judge, of
18 why I think we're going to have problems with the
19 questionnaire.

20 THE COURT: All right. Thank you, Mr.
21 Castellano.

22 Well, let's do this: The Government hasn't
23 had an opportunity to respond to that motion, so I'm
24 not going to rule definitively today. I can tell you
25 that I am strongly inclined to allow a jury

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1 questionnaire. I'm less convinced that a statewide
2 venire is going to help us with any problem that we
3 have. But if the defendants think it's important for
4 the appearance of justice that you have a statewide
5 venire, I'm willing to do that. I want the
6 defendants to feel like they've got a fair jury. So
7 it will be some juror inconvenience, but I'll trade
8 off juror inconvenience of a few people to make sure
9 the defendants feel like the jury is fair and
10 impartial to them.

11 The reality is, if I get some folks from
12 Hobbs, they're going to be traveling about five hours
13 over here anyway. Not a lot different from coming
14 out of Bernalillo County, which is where most of --
15 probably your northern folks are going to come -- I'm
16 going to probably have a few from Farmington and
17 stuff. But like I said, I'll trade off juror
18 inconvenience to make sure the defendants feel like
19 they've got a fair jury.

20 The jury questionnaire, I'm inclined to
21 allow one. Again, I'll allow the Government to,
22 after they listen to me talk this afternoon, decide
23 they want to continue to oppose it, then we'll --
24 they can file their response. I read most of the
25 defendants' motions during the break. But if the

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1 Government wants to oppose it, we'll pick it up on
2 the 20th, and resolve any issues and objections.

3 But if I'm going to have a questionnaire,
4 I've got to go ahead and move now. So I'm going to
5 set some deadlines for some things to be done. This
6 will be without prejudice to the Government. If you
7 want to take another swipe at it on November 20th,
8 you can.

9 And while I'm setting some deadlines --
10 these are not in stone, because Ms. Wild is going to
11 have to walk out of here and talk to Mr. Sorrell and
12 see if they're doable, so she'll get back with you
13 and finalize these. But while we're together let's
14 talk about the trial. We're going to seat 18 jurors.
15 We're going to have, we just decided, 22 peremptory
16 challenges without prejudice to trying to increase
17 that number from the defendants. But that puts us at
18 38 right there.

19 Let's see, I wrote it down, and then I
20 crossed it out. I think Ms. Wild anticipates, with
21 18 jurors, that she thinks that for cause might be as
22 high as 30. I'll have to think about that. We're
23 moving awfully quick on this today. But the longer I
24 serve, the more for cause challenges there seems to
25 be. I don't know if it's just getting people --

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1 harder to get people to sit on juries or what. But
2 let's work with her 30. That's going to put us at
3 68. That's a lot of people to work with in the
4 courtroom. So here's what I propose, is I don't
5 think I can probably, with 18 jurors, get mine out of
6 my usual 45, 46 in Albuquerque. So I propose to
7 bring 60 into the courtroom. Let's see if we can get
8 our 18 out of that 60. I'll leave another 60 in the
9 jury assembly room -- actually, I'll leave another
10 80.

11 THE CLERK: No, 140 down there.

12 (A discussion was held off the record.)

13 THE COURT: So we'll have 60 minus 140,
14 will be 80. So I'll have 80 in there, and then we
15 can think about this. And we can do this in waves
16 and bring another 60 in; do our voir dire. And if
17 necessary, bring another 20 in. What I've done in
18 the past -- and I think it's only happened once that
19 I haven't gotten my jury out of that first batch --
20 maybe twice -- but maybe, we just bring up another 10
21 or something like that. We can agree on it so nobody
22 gets an advantage at the time. But we can agree on
23 it. But I guess my thoughts would be, if we're
24 looking around at -- rather than bringing 60 in and
25 doing it all again, bring in five, 10, see what our

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1 needs are at that point. But to do the voir dire
2 again it sure goes quicker with five or 10 than it
3 does with the jury box. And then add those to the 60
4 and start doing our peremptory challenges. So that's
5 what I'm thinking of.

6 So we'll -- so the Government, if it wants
7 to say something, it needs to do it before the 20th.
8 We'll pick this back up. And then I'll use the 20th
9 to resolve any issues or objections.

10 Here's what I propose as far as a
11 schedule -- and this is what Ms. Wild will be working
12 with Mr. Sorrell to see if we can finalize this --
13 the parties shall, by the end of business on November
14 22, 2017 -- I think that's Wednesday -- the parties
15 shall submit to the Court the final version in an
16 executable format, a cover letter from Jury -- so
17 that's the cover letter that will go from the Jury
18 Services, the jury technician, to accompany the
19 special questionnaire to give some detail about the
20 case. So you'll need to agree, or attempt to agree
21 on a cover letter and then the questionnaire. We'll
22 draft the cover letter, then y'all just work on the
23 questionnaire.

24 See if you can agree. And if you can't
25 agree, then submit to me a questionnaire that shows

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1 how much you agree. And then I'll make the final
2 decision on what goes out. I don't think we're going
3 to have time for argument on it, because I'm going to
4 have to send those out on November 27, which is
5 Monday. So that's going to be over those holiday
6 weekends. So you get it to me by the end of business
7 on the 22nd, and we're sending it out on the 27th.
8 And so I'll just have to make some calls as to
9 whether it's in and out. If you want to send a
10 little brief, want to send a little letter making a
11 pitch as to why I should keep something in or take
12 something out, you can do that. And I'll just make
13 the best call I can. It goes out on the 27th.

14 These dates are horrible with the holidays.
15 But on December 27, the projected jurors are going to
16 have to return the special jury questionnaire, which
17 will mean -- I mean, literally these days are falling
18 on the 25th, so I'm bumping them over. Then January
19 1st -- so I'll bump it over to the 2nd -- the VDQ,
20 which is that standard voir dire questionnaire that
21 you get, you're going to get, and the special jury
22 questionnaire, those will be available to counsel.

23 And then -- so we're into 2018 now. On
24 January 15, 2018, by that point, the parties give the
25 Court an agreed for cause challenges due in writing.

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1 So try to agree as much as you can on the for cause
2 challenges, and then send them to the Court. And
3 then the ones you can't agree on, tell me what they
4 are and then I'll make the best call I can.

5 MS. SIRIGNANO: Judge, can you repeat them
6 again, please?

7 THE COURT: Yeah, I'll repeat them. Let me
8 get through them first, and then I'll just repeat
9 them all.

10 So I'll get a list on the 15th, the
11 parties' agreed for cause challenges due in writing.
12 And then the parties' disputed for cause challenges
13 due in writing.

14 I will then exercise for cause challenges
15 based upon the parties' for cause challenges. I will
16 not excuse anybody for cause that nobody has
17 challenged. So I'm not going to do -- I know some
18 judges do this, they go through it and make
19 independent cuts. I'm not going to do that. If
20 y'all don't put one on the table, I'm not going to
21 for cause it, because, otherwise, people will be mad
22 saying, why did the judge excuse that person? I
23 wanted that person on the jury? So I won't do that.

24 On January 22nd, that will be when you'll
25 get my ruling and order on the disputed for cause

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1 challenges. I'll issue it by that date.

2 For prospective jurors calling in to
3 determine if need to appear for selection: The
4 reason we're doing it that date, we're going to be a
5 week out from trial, and so I need to tell the
6 prospective jurors that are calling in whether they
7 need to appear for selection. So I'll make the
8 ruling and the order. And then we'll be telling
9 simultaneously Jury Service that they can inform
10 those jurors that they don't have to -- they'll be
11 notified they don't have to appear, should they plan
12 to be present for the selection.

13 Then our jury trial is January 29, 2018.
14 I'll repeat the dates here in a minute. But here's a
15 few thoughts. I haven't studied this jury
16 questionnaire that you've -- at all -- Mr. Castellano
17 has pointed out more than I've read. I tend to think
18 that, having done a number of jury questionnaires,
19 and y'all have done a lot -- they're a little bit
20 better if they're shorter rather than longer. You
21 get some irate jurors. Remember these people can end
22 up on your jury. And they get a little irate if they
23 have to fill out the standard voir dire
24 questionnaire, the voir dire questionnaire sent by
25 the court -- remember there is one that you never

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1 see, unless they don't fill these out.

2 So by the time you get to the special
3 questionnaire, it's the third questionnaire they
4 filled out. And then they come to court and you ask
5 them more questions. And they get a little irate.
6 So I tend to think a little bit shorter rather than
7 longer is better. But I'll play ball with you,
8 Counsel. This is for your benefit.

9 The other thing is: Don't kill each other
10 over the questionnaires. I tend to think that
11 sometimes we are critical of the other side's
12 questions. And sometimes, if you just listen,
13 sometimes your opposing counsel can ask a really good
14 question. All you're trying to get is the jurors to
15 talk and open up their thoughts. And sometimes your
16 opposing counsel can ask a question that reveals a
17 lot that you're grateful that they got them to
18 talking. So all I would say to you is be generous
19 with each other. It's voir dire. And see if you can
20 live with things rather than trying to hone them.

21 And the same way with the other side. If
22 people are making suggestions, see if you can live
23 with those. A lot of times a word or two tinkering
24 can satisfy the other side, and get you through it,
25 and get your question in, rather than risk me looking

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1 at it and crossing the whole thing out.

2 So those are just some words of advice.

3 Do I have any other words of advice,

4 Ms. Wild, that I usually give on questionnaires?

5 That's about it.

6 THE CLERK: I don't think so.

7 THE COURT: All right. So let me give you
8 the dates again. Motions filed, if the Government
9 wants to file any response, it needs to do it before
10 the 20th, so I can look at it and be ready for the
11 20th. We'll have a hearing on the 20th to resolve
12 any further issues or objections the Government might
13 have or the parties might have.

14 November 22nd, which will be that
15 Wednesday, you'll submit to the Court the final
16 version in an executable format. We will prepare the
17 cover letter from the jury technician to accompany,
18 to give some detail about the case.

19 And on November 27, 2017, the SJQ, special
20 jury questionnaire, will be mailed out.

21 December 25 -- or 26, 2017, the prospective
22 jurors will return, by that date, the SJQ.

23 By January the 2nd, 2018, the VDQ and the
24 SJQ will be available to counsel.

25 January 15, 2018, the parties' agreed for

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1 cause challenges will be due in writing. And the
2 parties' disputed for cause challenges will be due in
3 writing.

4 And on January 22, 2018, I will issue a
5 ruling and order on the disputed for cause
6 challenges. I will issue it that day, or by that
7 day. And then the jury selection, jury trial, will
8 be January 29, 2018. Again, that's subject to
9 Lincoln Sorrell blessing it. It's also subject to
10 the Government taking another shot at me. And what
11 else anybody want to say about that? Are you
12 comfortable with that, Mr. Castle?

13 MR. CASTLE: Your Honor, I was talking to
14 the Government over the break. And one concern we
15 have is, I think that we have, is pretrial publicity.
16 And we haven't briefed it, but there seems to be some
17 law that might encourage individual voir dire on
18 pretrial publicity. Since there has been a
19 significant amount of it, what I'm proposing is the
20 Court consider, after the questionnaires and after
21 people have agreed on cause challenges, that if there
22 is some ambiguity as to whether certain individuals
23 that are left have been exposed to pretrial
24 publicity, that the Court consider doing that
25 individual voir dire, so as to protect, possibly,

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1 from poisoning the rest of the pool, either by
2 general voir dire questions that might go to that, or
3 discussions out in the hallway. If we can identify
4 those people earlier and reduce the chances of
5 poisoning the whole venire.

6 THE COURT: Well, let me break that down in
7 a couple of things. One is, if we do individual voir
8 dire, I think we'll be here forever. But I hear what
9 you're saying.

10 I will handle questions on: Do you know
11 anything about this case? And if somebody raises
12 their hand and think they know something about the
13 case, I will bring them to the bench. We'll do a
14 sidebar. And I will do all that questioning outside.
15 We'll fog everything so that they can't hear. But
16 we'll do that at the bench. I will not have jurors
17 telling us what they've read, because that would
18 defeat the purpose of it. So does that address your
19 concern?

20 MR. CASTLE: Yes, Your Honor.

21 THE COURT: All right. Anybody else on the
22 questionnaire? On the venire?

23 All right. Let's then move to --

24 MR. BLACKBURN: Judge, before you move on,
25 may I address the Court?

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1 THE COURT: Certainly.

2 MR. BLACKBURN: I spoke to Mr. Castellano
3 about this before the Court mentioned about a
4 statewide questionnaire, when you were talking about
5 jury convenience. We were wondering about counsel
6 convenience. And I understand that the Court may
7 have made some comments at one of the last hearings
8 that didn't involve this group. But I know the Court
9 has a specific method of the number of days a week
10 that we will work, and whether we will, in big trials
11 like this, whether we will take Fridays off or
12 Mondays off for those issues. And I know the Court
13 has made comments on other cases. But I don't think
14 you've ever addressed this group, the 4268, or this
15 case, as to trial schedules, and whether we will
16 break early for those people who need to get out of
17 town. My argument was going to be, if you don't want
18 to do a convenient statewide, to accommodate the
19 jurors who want to get home on a Friday afternoon,
20 after they've been here all week, you can always take
21 a Friday off, or something.

22 But I'm more looking now that we've passed
23 the juror convenience to lawyer convenience and staff
24 convenience. So that we can start working on that.
25 So if the Court has that in mind, or your standard,

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1 if you could let us know what that is, so that we can
2 start making arrangements for -- if we need to hire
3 more people, or we need to hire people to drive us
4 back on a Friday night, or something like that. I
5 don't know if Uber goes all the way back to
6 Albuquerque.

7 THE COURT: Oh, you can pay anybody. Kind
8 of like Lloyd's of London. They'll sell you a
9 policy. I don't know how much it would cost you, but
10 they'll sell you one.

11 MR. BLACKBURN: Do you think Ms. Waters
12 would approve that on our budget?

13 THE COURT: I don't know. Y'all got as
14 about a good feel for that as I do.

15 Well, look, it's not going to be easy.
16 It's not going to be easy. And I don't tend to like
17 to drag things out. I will be slightly open minded.
18 But I will tell you what I'm inclined to do is:
19 Let's just get her done. So we're not going to be
20 taking Fridays off. We're not going to be quitting
21 early. I think the best way to help the jurors get
22 it done, get them back up there. If we drag it out,
23 it will just be more painful for us. I don't know
24 about y'all, but about the third week of a month-long
25 trial, I always wished I'd gone into coaching or

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1 ministry, or something else. But that third week
2 just seems like, wow, you just wish you'd have done
3 something else with your life. So I'll keep an open
4 mind. But I'd be inclined, let's just get it done.
5 So if that's any guidance to you in planning where we
6 are.

7 MR. BLACKBURN: Does that include
8 Saturdays?

9 THE COURT: No, we won't work Saturdays.
10 We won't work Saturdays or Sundays. We'll try to
11 keep good hours. We're dealing with a lot of people
12 here. It's going to be reduced for the first trial,
13 and the second trial. I hope we'll be able to move
14 it better, shorter breaks, get in here and get
15 started and stuff like that. But we've had a lot of
16 things to consider with so many people. But with a
17 smaller group, I think we can keep better hours and
18 just get it done.

19 All right. Then I think that the next
20 motion we're up to is -- I hope I haven't gotten
21 everything out of the order.

22 THE CLERK: We're not doing 7.

23 THE COURT: What I'm showing as next -- and
24 correct me if I'm wrong -- is Mr. Perez' motion. I
25 can't find the motion.

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1 THE CLERK: We're tabling that.

2 THE COURT: We're tabling number 8?

3 THE CLERK: Number 7.

4 THE COURT: Did I think I did number 7?

5 All right. Mr. Villa, do you want talk to
6 me about your Rule 16 and Brady motion?

7 MR. VILLA: Yes, Your Honor. If you
8 recall, before I took us into the world of statewide
9 jury pools and jury questionnaires, we asked the
10 Court to put this aside so we could talk. I have
11 spoken to Ms. Armijo, and she has agreed to turn over
12 the items that the Government was initially
13 resisting. And I'll let her speak, I guess there is
14 a couple of caveats. With respect to the first issue
15 in dispute, which was a map or a layout of Southern
16 New Mexico Correctional Facility, they're willing to
17 provide us something that -- an internal document
18 that Department of Corrections may have, subject to
19 what she hears back from them. They have had some
20 security concerns.

21 I told her what I needed, which is
22 essentially just the buildings, and the names of each
23 building. I don't need anything else. So, depending
24 upon whether Department of Corrections says, We need
25 a court order, we'll come back to you on that. The

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1 Government will also agree to give me -- if we can
2 come up with a Google Earth or Google Map picture
3 that has the buildings, one of their folks will
4 identify those. So both of those things will be
5 coming our way. Again, with the caveat that the
6 Department of Corrections might resist us, even on a
7 more trimmed down schematic, if you will.

8 The other thing that was at issue was more
9 identifying information about the confidential human
10 source. BM are the initials. The Government has
11 agreed to tell me where he is. In fact, they already
12 have told me where he is. And he has counsel, so I
13 can speak to counsel about trying to get his client
14 interviewed -- his or her client interviewed. So I
15 think that settles that issue.

16 And the last issue, I'm not sure if there
17 was a dispute with the phone calls of the cooperating
18 witnesses. So the Department of Corrections has
19 provided to the Government all of the phone calls of
20 the cooperating witnesses that they have in their
21 custody. With respect to the United States Marshals,
22 there was some mentioned this morning by Ms. Armijo
23 that maybe there was going to be some resistance.
24 But it turns out that we're going to get all of the
25 phone calls of the cooperating informants that I

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1 identified in my motion -- and I mean, cooperating
2 defendants -- from Sandoval County Detention Center,
3 as well as Otero County, where our newest member,
4 Mario Rodriguez was. And I think unless one of my
5 colleagues corrects me, that covers all of the phone
6 calls that we were after in this motion.

7 THE COURT: All right. Anybody else have
8 anything they want to say on this motion?

9 Ms. Armijo, did Mr. Villa correctly state
10 your and Mr. Villa's agreement?

11 MS. ARMIJO: Yes.

12 THE COURT: All right. Anything else on
13 this motion?

14 MR. VILLA: The only thing I would add is
15 the Government -- one of the things I mentioned in my
16 reply is even the things that the Government agreed
17 to provide, they have not. The Government has
18 informed me that those are coming in this next batch
19 that's gone on to Mr. Aoki. So we're expecting to
20 get it within a week or two.

21 THE COURT: So these are coming in that
22 batch?

23 MS. ARMIJO: Your Honor, they're already
24 all queued up. We're just waiting for -- so the
25 calls, there was an initial hard drive we received,

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1 218 gigabytes. And the FBI received another set.
2 And that was the ones that include the detention
3 facilities. But several defendants have made
4 requests for NMCD calls, either through their IPRA
5 requests, or through us. Those calls just went to
6 the -- got to the FBI-Albuquerque, and will be sent
7 down to us tomorrow. I think they're being driven
8 here tomorrow. So that's another hard drive. We
9 have to get with Mr. Aoki and see if the hard drive
10 he sent to us is able to do that as well. That's
11 going to be another, I understand, another 400
12 gigabytes calls. So given all that, as long as there
13 are no hard drive issues, we should be able to get
14 those out with everything else.

15 THE COURT: All right. Does that work for
16 you then, Mr. Villa?

17 MR. VILLA: That does work. And maybe this
18 brings up the issue with respect to the tablets. If
19 for some reason, given our time crunch, there isn't
20 enough room on the tablets, the tablets have recently
21 been modified to have more room. What I would ask
22 the Government to do is to produce those to us.
23 Because if there is 400 calls -- forget how many
24 megabytes or gigabytes -- we have to start listening
25 to them. And then we can figure out a solution so

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1 that our clients can listen to them. But I don't
2 want to see, Well, the tablets don't have room, so we
3 can't turn them over to defense counsel.

4 THE COURT: How much extra storage did we
5 add on those things when we did it?

6 MS. HARBOUR-VALDEZ: 500 gigabytes.

7 MR. VILLA: Thank you.

8 So maybe it's not an issue, but if it is,
9 we can start listening to them in our offices to get
10 ready for trial, and figure out a solution for our
11 clients. But, you know, there are some things that
12 we've asked for that we don't get, because it's got
13 to go to Seattle first, and get put on the tablet.
14 And now that we're running out of time, that's the
15 one concern I have.

16 THE COURT: Well, let's -- go ahead, Ms.
17 Armijo.

18 MS. ARMIJO: I don't know what he means by
19 having us do anything first. When I spoke to Mr.
20 Aoki, he said that he can deal with it; that we send
21 them as we get it, and he can shrink them or do
22 whatever else he does. And that would probably add
23 more time. And the Court has given us a deadline on
24 some things. So we're not going to be tinkering with
25 it. We're just going to get it, copy it, and send it

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1 out.

2 THE COURT: Well, let's see if we have a
3 problem. If we have a problem, I'll be back down
4 here right after the deadline to get that material to
5 Mr. Aoki. Let's see if we have a problem. If we do,
6 we'll raise that.

7 MR. BLACKBURN: Judge, we received a phone
8 call, email from Mr. Aoki's office this afternoon, or
9 just recently, asking us about recalling the tablets.
10 And it says that they were provided with 9,000 jail
11 calls, and it was going to take 218 gigabytes. So
12 they're recalling the tablets. But now I don't know
13 if there is going to -- so I just say that to the
14 Court, because it sounds like we're getting a few
15 more.

16 THE COURT: Well, are these 218 part of the
17 400?

18 MS. ARMIJO: No. In addition to. There is
19 218, and then there is 400. Is that the correct
20 number?

21 THE COURT: Why don't you get on the phone
22 with Mr. Aoki, they're an hour behind us here, and
23 see if -- y'all can tell him that he's going to get
24 more, is he going to be able to squeeze that down, or
25 is that --

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1 MS. SIRIGNANO: Your Honor, he says the 500
2 gigabyte drives can be installed on the tablets. And
3 that the 9,000 calls are approximately 218 gigabytes.
4 So they should fit on the upgraded drives.

5 THE COURT: Okay.

6 MS. SIRIGNANO: But Mr. Aoki is going to
7 need time to convert all these calls, including the
8 additional 400. So there seems to be some extra
9 space on the drives. But the delay will be receiving
10 the calls, converting the calls to a format that will
11 play on the tablets, then installing them, recalling
12 tablets, then installing them on the tablets, and
13 sending them back to the clients.

14 THE COURT: Well, it sounds like the
15 Government is going to -- is in good shape to meet
16 the deadline. So maybe we can squeeze a little time
17 out before. Because they've got a deadline. But
18 they're not waiting until the deadline. They're
19 trying to get it done, maybe even today or tomorrow.
20 So maybe we're going to get -- find some time at the
21 front end rather than the back end that Mr. Aoki is
22 having to work with. Do you see with I'm saying?

23 MS. SIRIGNANO: Yes, Your Honor. And we'll
24 talk with Mr. Aoki after the hearing.

25 THE COURT: Yeah. Tell him if there is

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1 something I can do, I'll try to make it happen.

2 MS. SIRIGNANO: Thank you, Judge.

3 THE COURT: All right. Anything else, Mr.
4 Villa?

5 MR. VILLA: No, Judge.

6 THE COURT: All right. That takes care of
7 everything in your motion?

8 MR. VILLA: It does.

9 THE COURT: All right. So let's go to what
10 is teed up as motion number 8. This is also your
11 motion. Did I get everything out of order here?

12 THE CLERK: 1253 is the next one, Dan
13 Sanchez' motion to compel.

14 (A discussion was held off the record.)

15 THE COURT: All right. So we'll take up
16 Document 1253. This is Defendant Daniel Sanchez'
17 motion to compel specific discovery. Ms. Jacks.

18 MS. JACKS: Good afternoon, Your Honor.

19 THE COURT: What's left on this issue you
20 need rulings on?

21 MS. JACKS: Not a lot. And we can just go
22 right to it. So number C was a request for the audio
23 visual recordings of the informants during contact
24 visits with girlfriends or wives, and other family
25 members. And these are visits in which the

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1 informants engaged in sexual activity in front of
2 children over a period of several hours on multiple
3 different occasions.

4 The Government has agreed -- well,
5 obviously, this is relevant to the credibility of the
6 informants, and the benefits they received because of
7 their cooperation. What the Government is saying is
8 those videos are only going to be available for
9 review at the U.S. Attorney's Office.

10 I think they should be provided to counsel
11 for review in their office. These are videos that
12 we're going to want to take excerpts of for various
13 motions hearing, and perhaps trial exhibits for
14 cross-examining the informants. And that can't be
15 done in the U.S. Attorney's Office.

16 And I guess the other thing is, just as a
17 logistical matter for me, and I think for others
18 here, we're not local. And the amount of time that
19 it takes for such a review, is substantial.

20 THE COURT: And these are, as you said,
21 obviously relevant because that would be a violation
22 of some prison privileges?

23 MS. JACKS: Well, for sure. And I think
24 also because, as a benefit of cooperation, these
25 informants, who are generally only permitted to visit

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1 for very limited periods of time, through a glass
2 partition, using a phone, were allowed access to
3 their family members in some sort of contact
4 situation that was not monitored in real-time by
5 prison staff. And the visits, from what I can tell,
6 went on for several hours. That's clearly something
7 that's unusual for inmates of this -- held in this
8 type of custody. And was clearly done after they
9 agreed to cooperate with the Government.

10 THE COURT: So your theory is that these
11 were additional rewards for cooperating?

12 MS. JACKS: Yes. And I also think it goes
13 to the informants' attitudes towards cooperating and
14 towards these proceedings. I mean, they -- as a
15 benefit of their cooperation, they were able to get
16 contact visits, which many of them immediately
17 abused, by engaging in what I think is felonious
18 criminal activity in front of children, involving sex
19 offenses.

20 THE COURT: Well, if they were married,
21 what's the felony?

22 MS. JACKS: Well, I think, depending on the
23 age of the children, contributing to the delinquency
24 of a minor would be at least one that I can think of
25 with respect to engaging in intercourse in front of

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1 children that aren't old enough to understand what
2 that is.

3 THE COURT: Okay.

4 MS. JACKS: Indecent exposure might be
5 another, depending on the situation.

6 THE COURT: All right. Anything else,
7 Ms. Jacks, on that issue?

8 MS. JACKS: On that particular request?

9 THE COURT: Anybody else? I can't remember
10 on this if anybody joined your request on this one?
11 No, it was just y'all. But does anybody else have
12 anything to say on that? Mr. Lowry?

13 MR. LOWRY: Your Honor -- and I just
14 briefly add to this, along with the benefits that
15 Ms. Jacks is talking about, another one that I was
16 mentioning earlier, in terms of the scope of Brady
17 and Giglio, there is a complete failure to report any
18 of this child abuse to CYFD, which would also be a
19 benefit that ran to the cooperating individuals in
20 this case. Given that we have reason to believe,
21 based on the paper discovery that's been disclosed,
22 that there were fairly obvious sex acts going on in
23 front of very small children that went unpunished and
24 unreported.

25 THE COURT: Okay. Thank you, Mr. Lowry.

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1 Ms. Bhalla, did you have anything?

2 MS. BHALLA: I think Ms. Jacks can cover it
3 if she needs to.

4 THE COURT: All right. Anyone else want to
5 comment on this?

6 All right. From the Government, are you
7 going to handle this, Mr. Castellano?

8 MR. CASTELLANO: Yes, Your Honor.

9 So in terms of benefits, they were allowed
10 contact visits with their family. They were not
11 allowed conjugal visits. And so clearly that was a
12 problem with their conduct.

13 In terms of investigation, and CYFD,
14 actually all of these incidents were turned over to
15 New Mexico State Police. We took a hands-off
16 approach to the investigation. So New Mexico State
17 Police made its own decisions about charging or not
18 charging any of that conduct.

19 So we have made -- as the rules allow, we
20 have made available the video, the visitations to
21 defense counsel. And the reason we didn't want to
22 put it out there, or put it on the tablets, is that
23 it does involve sexual activity. One of the
24 incidents involves heavy petting over the clothing.
25 But there are other sexual acts on the videos. So

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1 what we wanted to prevent was that information being
2 disclosed. So we've agreed to make it available for
3 viewing at the office.

4 THE COURT: All right. So we're just
5 fighting over where this is going to be produced?

6 MR. CASTELLANO: Yes, Your Honor, that's
7 correct.

8 THE COURT: Okay.

9 MR. CASTELLANO: There is no doubt that it
10 will be produced, it's just the manner in which it
11 will be produced.

12 THE COURT: All right. Thank you, Mr.
13 Castellano.

14 Ms. Jacks, I'll give you the last word on
15 it.

16 MS. JACKS: Well, Ms. Bhalla was just
17 reminding me that apparently there are drug exchanges
18 occurring upon the videos as well. And my point is,
19 as the Court noted, we're in the final push towards
20 trial. And so what I think an efficient use of
21 defense counsel and defense team time would be would
22 be to watch these videos, and arrange to make the
23 excerpts as we're watching them, that we feel might
24 be necessary for cross-examination of these
25 informants. And that's not something that we can do

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1 in the U.S. Attorney's Office.

2 THE COURT: Well, let's say I say they
3 should remain at the U.S. Attorney's Office rather
4 than at the prison. How would you, then, go about
5 making your excerpts? Telling the Government what
6 you want excerpted, and them sending it to you?

7 MS. JACKS: I wouldn't want to do that,
8 because I think that would reveal our strategy with
9 respect to cross-examination.

10 I'm not asking, just so that it's clear,
11 that these videos go into the prison. What I'm
12 asking is that these videos be released to the
13 various defense teams so that they can prepare their
14 cross-examination, as they deem appropriate, or their
15 examination of these informants during whatever
16 hearings this Court may hold on other issues such as
17 suppression.

18 THE COURT: Well, did you give that some
19 thought, Mr. Castellano, of just making these
20 attorneys' eyes only, making a copy and sending it
21 just to counsel that want it?

22 MR. CASTELLANO: May I have a moment, Your
23 Honor?

24 THE COURT: You may.

25 MR. CASTELLANO: Your Honor, the discussion

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1 we're having -- let's say, for example, we put the
2 recordings on CDs or DVDs for the defense teams for
3 their eyes only. The question then is whether any
4 redactions need to be made. For example, at least
5 one of them has children in the room. So would they
6 expect us to do that, or would they be willing to
7 redact any identities of children or anything else
8 for purposes of showing the video to anybody else?

9 THE COURT: Would you be willing to redact
10 them? If you're given a copy, redact it?

11 MS. JACKS: Let me see if I understand. I
12 think the issue is the identities of the children,
13 not the fact that there are children. Because the
14 fact that there are children goes to the conduct of
15 the informants.

16 THE COURT: If they don't want to get the
17 children in, if they just black out the face, would
18 that work for you?

19 MR. CASTELLANO: We are talking about the
20 identities of the children, not the fact that
21 children are present.

22 THE COURT: All right.

23 MS. JACKS: I think that's reasonable.

24 THE COURT: Could you do that? All right.

25 MR. CASTELLANO: And anything else that

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1 needs to be redacted.

2 MS. JACKS: I guess we would have to
3 discuss that. I haven't seen the videos, so I don't
4 know --

5 THE COURT: What else are you thinking of?

6 MR. CASTELLANO: Well, sexual acts,
7 including display of a penis, would be at least one
8 of those. So the question is what will be shown and
9 to whom will it be shown?

10 THE COURT: It seems to me you probably get
11 your full bang for the buck by just blacking out what
12 you're wanting there, right? I mean -- and the jury
13 is going to know. Do they need to see them having --
14 do we really need to see the penis?

15 MS. JACKS: I haven't seen the videos. And
16 I think it could possibly depend on the situation.
17 But I think what we could do is certainly try to use
18 our discretion. And we're not here to offend
19 anybody. We're here to show the degree of the
20 activity. So I think we could use our discretion and
21 show them to the Government before we were to use
22 them.

23 THE COURT: All right. I'd be inclined to
24 go with the Government on that. So I'll keep an open
25 mind, but if you can't work it out, bring it back up

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1 with me. But I think you made your point. If
2 somebody wants to say what's there, you can have them
3 testify as to what's there. But I'm not sure we need
4 to actually see that.

5 MS. JACKS: I hear the Court's comments.

6 THE COURT: Okay. So you're going to do
7 the redactions. The Government is going to give you
8 the videos, but you'll do your own redactions, be for
9 attorneys' eyes only.

10 MS. JACKS: Okay. And I'm understanding
11 that that's each defense team will be given access?

12 MR. CASTELLANO: Yes, in the Molina case.

13 THE COURT: Are these just Molina? These
14 inmates just relevant to the Molina case?

15 MS. JACKS: I don't think so. But I think
16 that would a question for the Government to answer.

17 MS. SIRIGNANO: Your Honor, I would object.
18 I believe that all defendants should get copies of
19 this.

20 THE COURT: Let me, first of all, hear from
21 Mr. Castellano. What would be the reason of limiting
22 it to the Molina homicide?

23 MR. CASTELLANO: Well, this would be Giglio
24 as to those witnesses in the case, which currently is
25 the Molina murder trial. And that would include

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1 Christopher Garcia. He's part of that trial. And if
2 they were called in another trial, then we would also
3 disclose that in the other case.

4 So, basically, when it becomes Giglio as to
5 any of those people being witnesses, we would
6 disclose that.

7 THE COURT: Let me think this through. We
8 a minute ago had a proposal on the table, that the
9 Government did not want, that would set a different
10 deadline for Giglio and Brady disclosures, because
11 it's doing this for everybody throughout. I guess
12 I'm a little reluctant to now go back on this
13 particular production only making it available to the
14 Molina people. So it seems to me that's
15 inconsistent. I'd be inclined just to not start
16 picking and choosing.

17 MR. CASTELLANO: We'll just disclose it to
18 everybody. That's fine. We don't need to argue.

19 THE COURT: All right. Anything else,
20 then, on that issue, Ms. Jacks?

21 MS. JACKS: No. That's taken care of.

22 THE COURT: All right.

23 MS. JACKS: If we can move to I, which --
24 this is a request -- if the Court may recall, there
25 were several Government cooperators who apparently

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1 performed some sort of reset on their tablets that
2 were provided to them pursuant to this Court --
3 pursuant to a court order -- and were able to access
4 the internet. And this became a subject of
5 controversy earlier this year. So at the time that
6 that happened, I think what we requested was we
7 wanted to know what informants manipulated their
8 tablets, what they did, and we wanted some sort of
9 history about whether they accessed the internet,
10 what they accessed, whether they accessed email, what
11 they accessed.

12 We haven't gotten anything as of this
13 point. And I think originally the request from Ms.
14 Duncan was to have the tablets seized so that they
15 could be examined by experts for the defense to
16 determine that information for ourselves.

17 The Government's response is that they
18 received permission from some of the cooperators for
19 an inspection of their tablets, and is waiting for
20 the position of the remaining cooperators.

21 I have to say that the response blew my
22 mind. They're waiting for permission from people who
23 violated this Court's order, abused the tablets and
24 accessed the internet, to get the tablet back? It
25 seems to me that the tablet should have been seized

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1 when the person violated the court order. I don't
2 understand why they got it back.

3 THE COURT: Well, educate me a little bit
4 about what portion of the court order it violated.

5 MS. JACKS: Well, I should pull the court
6 order out. I don't have it before me. But I thought
7 the tablets were to be used for viewing discovery.
8 And I think part of the court order was the
9 defendants were supposed to let their tablets be
10 examined to determine if there was contraband or if
11 they had somehow abused the tablets. And it was my
12 understanding, and certainly it was explained to Mr.
13 Sanchez, that if he chose to abuse the tablet and it
14 was taken from him, that there is a chance he'd never
15 get it back. And I think that's how we all
16 understood the deal with the tablets.

17 So I don't understand why Government
18 cooperators misused the tablets, accessed the
19 internet, they get them back before there is any sort
20 of examination made about what exactly they did. And
21 now we're waiting their permission to see what
22 happened.

23 THE COURT: Let me pull up the court order.
24 I think I handwrote this portion. There was a
25 disagreement on how we were going to handle

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1 government and security. I guess given that -- to
2 the extent that these cooperators are defendants, and
3 I guess that's the definition of what we're using by
4 cooperator, it would seem to me that the same rules
5 apply. They're still a defendant in this case. They
6 may have pled, but I'm not sure that I can treat them
7 any differently than I can any other defendant. So
8 let me look at what the court order said, and then
9 we'll figure out what --

10 MS. JACKS: I think the way you treated the
11 defendants who are here was that their tablets were
12 submitted for examination to the United States
13 Marshal's Service, and returned to them once it was
14 confirmed that they hadn't abused the tablets.

15 Now, I don't know what happened with the
16 cooperators, since they did abuse the tablets, and
17 they got them back.

18 THE COURT: Why don't we come back to this
19 one. Let me print out that order and then let's take
20 a look at it and we'll go from there.

21 What else do you have, Ms. Jacks?

22 MS. JACKS: I have, I think, two more.

23 J is the next one. And I'm not the only
24 person -- I'm probably not the best person to be
25 arguing this request. But this is a request for the

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1 access to the electronic surveillance devices that
2 the Government provided to its cooperators so they
3 could record jailhouse conversations with other
4 inmates, including some of the defendants.

5 And originally -- again, I think this came
6 up at the hearing where Ms. Duncan made this
7 request -- and I think it was originally represented
8 that these electronic surveillance devices did not
9 contain meta data. Shortly after that hearing, I
10 think it was then the Government then changed their
11 position, and conceded that the devices, in fact, did
12 contain meta data.

13 But the United States continues to try to
14 keep the defense from accessing those devices and
15 examining the meta data, because they don't want --
16 they don't want the defendants to know what kind of
17 devices they are.

18 And I think, again, what we have -- and
19 this issue has been brought up by a variety of
20 motions. I think it's addressed in Defendant Baca's
21 1264, their request number 9. And I think it's also
22 the subject of some of the motions to suppress these
23 recorded conversations. Because, if you listen to
24 the conversations, what you see is that the people,
25 the informants that are operating these electronic

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1 surveillance devices are turning them on and off
2 during conversation as they see fit. They're not
3 recording the entire conversation. They're recording
4 bits and pieces that are then provided to the
5 Government.

6 What the analysis of the meta data on these
7 electronic surveillance devices would show is how
8 many times they were turned on and off; whether
9 things were deleted; whether things were edited.
10 That's the kind of information that's stored in the
11 device that needs to be examined by an expert in
12 order to make those determinations.

13 THE COURT: Mr. Beck, I recall -- was it
14 you and I had this conversation at the hearing?

15 MR. BECK: We did, Your Honor.

16 THE COURT: And I think you at that time
17 didn't think that there was any meta data on there,
18 and so we decided there may not be an issue. And you
19 were going to check it out.

20 MR. BECK: Yes, that's right. And we
21 checked it out. I think we found out, either while
22 the hearing was still going on or later that week
23 that there was meta data. I represented that to the
24 defense, and we disclosed the meta data on June 16.

25 THE COURT: Oh, you disclosed the meta

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1 data?

2 MS. JACKS: What was disclosed is a report,
3 and it's a Government analysis of the recording
4 device. It's my understanding -- and maybe someone
5 else who is more familiar with this issue can help me
6 out, but for the meta data to be disclosed, or for
7 the defense to make use of it in a meaningful way,
8 our expert needs to be able to examine the device.
9 We have reports of an examination conducted by the
10 FBI. But that is not the same as the meta data, is
11 my understanding.

12 THE COURT: Well, tell me what -- you know,
13 if you could get your hands on everything you wanted
14 on this, what is it that you're hoping it will tell
15 you?

16 MS. JACKS: That the informants who were
17 trying to earn favors from the Government edited the
18 conversations so that they appeared to say things
19 that was not the true content of the conversation.

20 THE COURT: Well, but are you going to be
21 able to tell from the meta data -- all it's going to
22 tell you is it was turned on and off during the
23 conversation?

24 MS. JACKS: When it was turned on and off,
25 potentially for how long, whether segments of the

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1 conversation that were recorded were subsequently
2 deleted before the device was downloaded by the
3 Government.

4 THE COURT: Is the meta data that specific
5 that it can tell you that it was turned off 13
6 seconds in, stayed off five seconds, goes 13 more
7 seconds, and then turned off five? Is it going to be
8 that specific?

9 MS. JACKS: It's my understanding that it
10 can be. I don't know what the electronic
11 surveillance device is. The Government won't tell
12 us. But I certainly have seen experts produce that
13 kind of information from electronic recording
14 devices.

15 THE COURT: Mr. Beck, are all the devices
16 the same?

17 MR. BECK: Your Honor, I don't know. And I
18 don't think that I could rightly tell you in open
19 court. As we had this discussion in the summer, when
20 you ruled that you wouldn't allow the defendants to
21 inspect these devices -- which I think was proper --
22 I don't know about these devices. We don't know
23 about these devices, because they are means and
24 methods that law enforcement uses in ongoing
25 investigations.

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1 So if we're going to get into this level of
2 depth, I'm not the right person. I don't think
3 Ms. Jacks is the right person. I think we're going
4 to have to call experts, and the FBI people from
5 Washington, D.C. fly down here and probably meet with
6 you in camera before we do this in open court.

7 So I think Your Honor's ruling there was
8 correct. The FBI produced the meta data that was
9 asked for. And frankly, I think that's where things
10 stand, unless we want to go down the road of bringing
11 in bigger guns to battle this out.

12 THE COURT: I don't -- you can correct me
13 if I'm wrong, I don't think at the time that I left
14 the hearing I knew there was meta data on there.

15 MR. BECK: I don't think --

16 THE COURT: I think this round of briefing
17 is new to me. And I think, quite frankly, we were
18 kicking the can down a little bit down the road.
19 Because if we found out there wasn't meta data, it
20 probably wasn't a big issue. But now that there is
21 meta data, it's a little larger issue.

22 Here's what I would propose: Check with
23 your people in Washington, see if you could live with
24 this. If you can confirm that all the audio devices
25 are of one type, could you send a letter to one of

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1 the counsel here -- and I'll let the defense counsel
2 sort of pick who they think is the one that should
3 work with the expert. And then, if they have -- if
4 they have the type of device -- and this would be for
5 one attorney's eyes only and the expert, and would be
6 subject to a confidentiality, if they knew that, can
7 they then tell us if it's going to produce any
8 reliable information? In other words, if it's not
9 going to be able to do what I'm saying it can do, or
10 suggesting it can do, that can tell you with
11 precision that there was a gap -- there was a
12 recording of 10 seconds or 10 minutes, and then there
13 was a gap of five minutes, and so we can look at a
14 transcript and we can say right here there was gap of
15 five minutes in between, then I guess I'm a little
16 bit hard pressed to think of how it could be useful
17 to the defendants. If they have -- if they have that
18 information. Then, if the meta data can be more
19 specific, then I guess it becomes a bigger issue.

20 MR. BECK: I think I understand what Your
21 Honor is getting at. And we certainly will see if we
22 can find a person to answer that question, and see if
23 they're willing to talk about that. I think that's
24 probably as far as we could go with that, as I said,
25 without bringing in some other folks to help us out.

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1 THE COURT: Well, let's take it a step at a
2 time. I'm sensitive to the FBI's need to keep their
3 techniques, things as confidential and possible. But
4 I'd like to find out if we're dealing with a real
5 issue or a phantom issue. I understand if it's a
6 phantom issue, and if I can get that limited
7 information into one counsel's hands and one expert's
8 hands, and throw it under a confidentiality order,
9 and they can then determine whether there is a bigger
10 issue here, then maybe we can just take it a step at
11 a time.

12 MR. BECK: Sure.

13 THE COURT: So I'm not denying it, but I'm
14 going to take it a step at a time. I do think that I
15 do have to be careful here about disclosing
16 Government techniques. This is the kind of thing
17 that has ramifications outside of this room.

18 MS. JACKS: I think that makes sense. And
19 I think we can work with that, Mr. Lowry?

20 MR. LOWRY: May I be heard on this, Your
21 Honor?

22 THE COURT: You may.

23 MR. LOWRY: Because this overlaps with part
24 of our motion to compel. The Court is wondering why
25 this is relevant, and I just want to put a quick fine

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1 point on this.

2 Your Honor, we believe one of the
3 Government's key witnesses in this case will be Eric
4 Duran. In Eric Duran's first FBI 302 on February 19,
5 2015, he put himself out as being at the epicenter of
6 this so-called conspiracy to murder Gregg Marcantel.
7 And over the course of the summer of 2015, he relayed
8 to the FBI, that's documented in other 302s, that Mr.
9 Baca was very eager and motivated to murder Gregg
10 Marcantel. And that was based on, frankly, on other
11 chatter that other Government informants had put into
12 the ether in the New Mexico prison facility, when Mr.
13 Baca was not even present in the facilities.

14 The reason this is material and relevant to
15 Mr. Baca's case is because when he came back to the
16 Department of Corrections, October 22nd of 2015, the
17 Government had placed Eric Duran right in the cell
18 next to him. And it was Eric Duran's prerogative and
19 mission to record Mr. Baca about this murder. In the
20 very first recording Duran sets up with Mr. Baca, is
21 like, wouldn't it be a great idea to kill Gregg
22 Marcantel? And the emphatic answer was no. And it
23 was unequivocal.

24 So this whole idea that Mr. Baca had
25 concocted this plan to murder the Secretary of the

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1 Department of Corrections was a myth. And what we
2 need to analyze the meta data take for is to
3 demonstrate quite clearly to this jury that after
4 being told that this was a bad idea, and one that he
5 wasn't motivated and engaged in and enthusiastic
6 about participating in, to demonstrate how long, and
7 the steps Mr. Duran had to take to convince Mr. Baca
8 to join this conspiracy. And that's relevant and
9 material to his defense under the state defense of
10 entrapment.

11 So this is not a hypothetical issue. This
12 is a very real issue for Mr. Baca. And we need
13 access to this meta data, which is why Ms. Duncan
14 requested it back in May.

15 THE COURT: Let's see if we can get you
16 information, so we can see whether you get the meta
17 data, it's going to tell you that. If it's not, then
18 I probably am not going to force them to do any more.
19 But if I can put in your hands what kind of equipment
20 this is, so you can talk to your expert, then I'll
21 have a hard issue to decide at that point.

22 MR. LOWRY: We have no problem with a
23 protective order, Your Honor, or limit it to a single
24 forensic expert to look at the material. The goal
25 here is not to divulge, or you know, out FBI

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1 surveillance secrets.

2 But on the flipside of that is this is
3 relevant and material evidence to our defense. And I
4 believe, under Rule 16, we're entitled to that.

5 THE COURT: So you'd agree with me that if
6 the meta data on this particular equipment doesn't do
7 that for you, then it's not going to do a lot of good
8 to start producing a lot of -- ordering the
9 Government to do a lot more?

10 MR. LOWRY: I wouldn't argue against that,
11 Your Honor. I don't disagree with that. I would
12 feel more comfortable to have our expert look at a
13 single device to make sure that that meta data isn't
14 there. And pardon me for being paranoid, but you
15 know, I prefer to have our own independent set of
16 eyes on the device to see what is and isn't there.
17 But I don't disagree with you. If there is nothing
18 tangible in terms of dates, times, you know, if we
19 can't assess time gaps, and you know, the lengths
20 of -- periods of time between recordings, yeah, I
21 think the issue of relevancy would fade to a certain
22 extent. But I would prefer to have our own
23 independent expert look at that so we could have a
24 firm, solid assessment from a defense perspective
25 about what's available and what's not, and how we can

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1 effectively use that at trial.

2 THE COURT: All right. Thank you, Mr.
3 Lowry.

4 Ms. Sirignano?

5 MS. SIRIGNANO: Your Honor, thank you.

6 I just wanted to point out that I have some
7 overlap as well in my Document 1270, my sealed Rule
8 16 motion, page 12, paragraph 7. And the Court did
9 order defense and defense expert access to
10 Mr. Garcia's electronic materials and CART reports.
11 But the Government is not allowing our expert, that
12 the Court's approved, to look at Mr. Garcia's
13 electronic devices. Part of that request also
14 includes the cellular telephones of Mr. Duran, Marvin
15 Montoya, and a few other Government cooperating
16 witnesses at this point.

17 And as Mr. Lowry stated, for the exact same
18 reason about the conspiracy involving his client,
19 it's the same cellphone that implicates my client,
20 Your Honor. So we would request also that our expert
21 be given access, if there is information, to review
22 it, to make sure that there is nothing there that
23 could help our defense, or that there is something
24 there that could help our defense.

25 THE COURT: Is there something different

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1 than the sort of incremental step I'm taking that
2 would be different for Mr. Garcia?

3 MS. SIRIGNANO: Well, Your Honor, I just am
4 receiving conflicting information. Because in
5 Mr. Garcia's drug case we were told by the Warden of
6 PNM, that Eric Duran's cellphone was not taken away
7 from him by the FBI or the DOC until some later time
8 which the warden could not provide when he was on the
9 stand, and that the cellphone was taken during a
10 sweep of the facility.

11 So I don't even have confirmation yet from
12 the Government whether or not that cellphone actually
13 exists to do an independent examination by our
14 defense experts to see if that data is there.

15 So that would be the first step, Your
16 Honor. And then, if there is meta data or any other
17 cellphone data, in terms of deleting text messages --
18 there were thousands of text messages -- we presume
19 that some were deleted -- between the informant and
20 Agent Acee. And other on and off stops and starts of
21 the recording. It's something that we'd like to have
22 our expert review independently, Your Honor.

23 THE COURT: All right. Let's do this:
24 We've kind of got two different issues on the table.

25 Let's come back and try to finalize what

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119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

**BEAN
& ASSOCIATES, Inc.**
PROFESSIONAL COURT
REPORTING SERVICE

MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

1 we're doing on the laptops or the tablets first in
2 the morning. I think I've got bring it to an end
3 here for everybody to get out of here. So that will
4 be the first issue.

5 If you can report anything, Mr. Beck, that
6 would be great. If you can't, we may just have to
7 confirm this is what we're going to do.

8 And then we'll take up the telephone with
9 Mr. Garcia. So that will be the second issue. So be
10 thinking about that, Mr. Beck, as to where we are on
11 the phone.

12 Then, Ms. Jacks, I'll come back to you,
13 because it sounds like you've got one or two more
14 issues on your motion.

15 MS. JACKS: Right.

16 THE COURT: All right. I appreciate
17 everybody's hard work. Have a good evening. We'll
18 start again at 9:00. And y'all have a good evening.
19 See y'all tomorrow.

20 (The Court stood in recess.)

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1 C-E-R-T-I-F-I-C-A-T-E
2
3 UNITED STATES OF AMERICA
4 DISTRICT OF NEW MEXICO
5
6
7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
8 Official Court Reporter for the State of New Mexico,
9 do hereby certify that the foregoing pages constitute
10 a true transcript of proceedings had before the said
11 Court, held in the District of New Mexico, in the
12 matter therein stated.
13
14 In testimony whereof, I have hereunto set my
15 hand on November 16, 2017.
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23
24
25

J. Bean
Jennifer Bean, FAPR, RMR-RDR-CCR
Certified Realtime Reporter
United States Court Reporter
NM CCR #94
333 Lomas, Northwest
Albuquerque, New Mexico 87102
Phone: (505) 348-2283
Fax: (505) 843-9492

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

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